Supreme Court, U.S.
FILED

101054 FEB 22 2011

OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

CITY OF CINCINNATI,
MILTON R. DOHONEY, JR., AND JOEL KOOPMAN,
Petitioners,

v.

MARK MILLER, COALITION OPPOSED
TO ADDITIONAL SPENDING & TAXES,
AND WEDEMANDAVOTE.COM,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN P. CURP
CITY SOLICITOR
PAULA BOGGS MUETHING
ASSISTANT CITY SOLICITOR
Counsel of Record
RICHARD GANULIN
ASSISTANT CITY SOLICITOR
ROOM 214, CITY HALL
801 PLUM STREET
CINCINNATI, OHIO 45202
(513) 352-4551
(513) 352-1515 FAX
paula.boggs-muething@cincinnati-oh.gov

February 22, 2011 *Counsel for Petitioners*

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

The government of the City of Cincinnati is centered in City Hall. City Hall is a workplace for the City's elected officials, appointed executives, and their staff. The City's chief executive has issued Administrative Regulation No. 5, which governs the use of the interior spaces of City Hall including for assemblages, such as meetings or press conferences. This regulation permits City officials to arrange for any appropriate use of the interior spaces of City Hall for assemblages including those with non-governmental entities with whom the City official has been collaborating. The interior spaces of City Hall are not available for use by private parties.

The Sixth Circuit's decision in this case opens the workplace of City Hall to impermissible intrusion by third parties. Third parties have always had access to the exterior steps of City Hall and the areas around the building. But access to the interior of City Hall - those spaces used by elected officials and the City's public employees to conduct the work of government – has been limited to City officials and those entities with whom a City official is collaborating. The City's regulation of the use of the interior spaces of City Hall allows City officials to use their workplace appropriately while allowing ample alternative channels for the public to engage in expressive conduct. Throwing open the doors of City Hall to the general public will chill the speech of the City's officials.

The Sixth Circuit's decision raises the following questions:

1. The use of the interior spaces of the City Hall workplace, a nonpublic forum, is limited to City officials and their third party collaborators and only for those uses that are consistent with the officials' rights and responsibilities under the City's Charter. Is this limitation reasonably related to the purpose of the City Hall workplace?

2. When City officials collaborate with third parties and that collaboration leads to an arranged assemblage in the City Hall workplace, a nonpublic forum, is the communicative message expressed at the assemblage government speech?

3. The administrative regulation governing the use of the interior spaces of City Hall limits proper uses to those that are within the rights and responsibilities specified in the City's Charter to the respective City official. Does this administrative regulation provide an objective line in the law from which a person of ordinary intelligence could identify the applicable standard?

PARTIES TO THE PROCEEDING

Petitioners (defendants and appellants below):

CITY OF CINCINNATI; MILTON DOHONEY, JR.; AND JOEL KOOPMAN

represented by Paula Boggs Muething and Richard Ganulin, Assistant City Solicitors, Room 214, City Hall, 801 Plum Street, Cincinnati, Ohio 45202; (513) 352-4551

Respondents (plaintiffs and appellees below):

MARK MILLER; COALITION OPPOSED TO ADDITIONAL SPENDING & TAXES; AND WEDEMANDAVOTE.COM

represented by Christopher Finney, Finney Stagnaro Saba & Patterson Co. LPA, 2623 Erie Avenue, Cincinnati Ohio 45208 and Curt C. Hartman, The Law Firm of Curt C. Hartman, 3749 Fox Point Court, Amelia, Ohio 45102

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

CITATIONS FOR OPINIONS BELOW 1

BASIS FOR JURISDICTION IN THIS COURT . . 1

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE 1

STATEMENT OF THE CASE 3

Procedural History 8

REASONS FOR GRANTING CERTIORARI 10

The Sixth Circuit's determination that the City's Administrative Regulation No. 5 is not reasonably related to the purpose of the forum is inconsistent with the analyses of the First and Fourth Circuits in Del Gallo and ACLU 11

The speech analyzed in this case, by government officials and their third party collaborators, is government speech that is not subject to First Amendment scrutiny 19

Administrative Regulation No. 5, governing the use of the interior spaces of the City Hall

workplace, provides an objective line in the law from which a person of ordinary intelligence could identify the applicable standard 24

CONCLUSION 27

APPENDIX

Appendix A: Opinion and Judgment, United States Court of Appeals for the Sixth Circuit (September 24, 2010) 1a

Appendix B: Opinion and Order, United States District Court, Southern District of Ohio, Western Division (November 19, 2008) 31a

Appendix C: Order re rehearing, United States Court of Appeals for the Sixth Circuit (November 24, 2010) 68a

Appendix D: Joint Stipulations of Fact, United States District Court, Southern District of Ohio, Western Division (October 21, 2008) 70a

TABLE OF AUTHORITIES

Cases

ACLU v. Mote,
423 F.3d 438 (4th Cir. 2005) 12, 13, 14, 18

Arkansas Educ. Television Comm'n v. Forbes,
118 S. Ct. 1633 (1998) 11, 17, 18

Bd. of Regents v. Southworth,
529 U.S. 217 (2000) 23

Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., et al.,
105 S. Ct. 3439 (1985) 16

Del Gallo v. Parent,
557 F.3d 58 (1st Cir. 2009) 12, 18

Grayned v. City of Rockford,
92 S. Ct. 2294 (1972) 24, 25

Griffin, et al. v. Sec'y of Veterans Affairs,
228 F.3d 1309 (Fed. Cir. 2002) 25

Johanns v. Livestock Mktg. Ass'n,
544 U.S. 550 (2005) 20

Keller v. State Bar of Cal.,
496 U.S. 1 (1990) 20

Mark Miller, et al. v. City of Cincinnati, et al.,
622 F.3d 524 (6th Cir. 2010) ..... *passim*

Metromedia v. Greenville-Spartanburg Airport Dist.,
991 F.2d 154 (4th Cir. 1993) 14, 15

Nat'l Endowment for the Arts v. Finley,
118 S. Ct. 2168 (1998) 18, 24, 26

Pleasant Grove City, Utah v. Summum,
129 S. Ct. 1125 (2009) 19, 20, 21, 22, 23

UFCW Local 1099 v. SORTA,
163 F.3d 341 (6th Cir. 1998) 25, 26

Ward v. Rock Against Racism,
109 S. Ct. 2746 (1989) 24

Constitution

U.S. CONST. amend. I ..... *passim*

U.S. CONST. amend. V 2

U.S. CONST. amend. XIV, § 1 2

Statutes

28 U.S.C. 1254 1

Regulation

City of Cincinnati,
Administrative Regulation No. 5 ..... *passim*

CITATIONS FOR OPINIONS BELOW

The decision of the Sixth Circuit Court of Appeals is reported as *Miller et al., v. City et al.*, 622 F.3d 524 (6th Cir. 2010). App. A. The order of the Court of Appeals denying the defendants' petition for rehearing en banc was not reported. App. C. The District Court's order granting plaintiffs' motion for preliminary injunction is reported as *Miller et al., v. City et al.*, 709 F. Supp. 2d 605 (S.D. Ohio 2008). App. B.

BASIS FOR JURISDICTION IN THIS COURT

The Court of Appeals filed its original decision on September 24, 2010. The Court of Appeals denied the petitioners' request for a rehearing on banc on November 24, 2010. 28 U.S.C. 1254 confers jurisdiction on this Court to review on a writ of certiorari the opinion of the Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

UNITED STATES CONSTITUTION AMENDMENT I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES CONSTITUTION AMENDMENT V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION AMENDMENT XIV (Section One):

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Like thousands of local governments, the government of the City of Cincinnati centrally houses its senior legislative, executive, and administrative officials in a building, in this case City Hall. City of Cincinnati officials maintain their offices and staffs in City Hall and they use areas within City Hall to help fulfill their public duties. Although it is explicitly expressed in the City's administrative regulation challenged in this case, but not mentioned in the Sixth Circuit's decision, private parties may without limit assemble and conduct their own private rallies and other events on the exterior front steps of City Hall thereby communicating a powerful and symbolic message that their concerns relate directly to the City of Cincinnati. The plaintiffs in this case have repeatedly done just that.

The interior of City Hall is expressly reserved for use by City officials for matters related to fulfilling their professional public obligations. The challenged administrative regulation expressly provides that the interior of City Hall is not generally available for private use by members of the public. Not surprisingly, indeed as expected, City officials exercising their own discretion sometimes collaborate with private parties for purposes of fulfilling the official's public obligations. It troubles the plaintiffs, and apparently the Sixth Circuit, that City officials have discretion to decide how and when to collaborate with private parties for an array of public purposes including the welfare of the City's own employees.

Zeroing in on the discretion necessarily allowed City officials, the Sixth Circuit misapprehended and

misapplied important First Amendment principles related to guarding against the risk of government censorship of private speech intended for expression in either public fora or private property. However, this Court has never applied those particular First Amendment principles to a nonpublic forum. Nor has this Court even suggested that it would do so. The Sixth Circuit's limited analysis is doctrinally inconsistent with the logic and precedent previously communicated by this Court. The *Miller* decision subjects all governmental entities within the Sixth Circuit to the imposition of private use of nonpublic fora even though the governments do not intend to make their workplaces generally available for private use.

The City and the Plaintiffs (or "COAST") negotiated Joint Stipulations of Fact "to develop a factual record for [the district court] prior to the Preliminary Injunction hearing . . . ."[1] On September 9, 2008, the City Manager adopted the current Administrative Regulation No. 5 to regulate use of the interior spaces of City Hall.[2] The City Manager is the chief executive and administrative officer of the City of Cincinnati and is responsible for the day-to-day operations of the City of Cincinnati.[3]

---

[1] Joint Stipulations of Fact, App. D.

[2] App. D, 71a at para. 1.

[3] App. D, 96a at para. 63.

Administrative Regulation No. 5 provides:

Interior of City Hall

City Hall is lawfully dedicated for the purpose of allowing City officials to exercise the rights and responsibilities specified in the Charter of the City of Cincinnati. City Hall has one primary entrance on Plum Street for ingress and egress and a second entrance in the courtyard that is wheelchair accessible. The entrances to City Hall are staffed by armed security guards. City Hall is open from 8:00 a.m. – 5:30 p.m.

The interior spaces of City Hall are reserved for use by the Mayor, City Manager and his assistants, City Councilmembers, City Department Directors, City Commissions and Boards, and City employees. The interior of City Hall is open to the public for purposes of visiting City offices and attending City Council and other public meetings. The interior of City Hall is not generally available to the public for other purposes.

When the Mayor, City Manager and his assistants, City Councilmembers, City Department Directors, and City Commissions and Boards intend to use interior spaces of City Hall for assemblages, they should notify the Facilities Management Division of the Public Services Department. That notice should be provided as far in advance of the intended use as reasonably practicable.

Facilities Management is responsible for insuring that the assemblage does not create security problems, unreasonably interfere with ingress or egress from City Hall, or otherwise unreasonably interfere with other official uses occurring inside City Hall.

City Hall Grounds

City Hall grounds includes the property surrounding the City Hall building up to and bounded by the public sidewalks on Plum Street to the east, Central Avenue to the west, Ninth Street to the north, and Eighth Street to the south.

The public and City officials may use City Hall grounds for lawful assemblages. For purposes of protecting the security of people and property in City Hall, and avoiding undue interference with the official business occurring inside City Hall, any person or entity desiring to use City Hall grounds for a lawful assemblage should submit notice, in writing, to the Facilities Management Division of the Public Services Department at least ten days prior to the proposed assemblage. The notice should include the following information about the assemblage: identification of sponsor; date and time; duration and type of event; area of City Hall grounds; approximate number of persons expected to attend; amplification equipment. City Hall grounds may not be used for commercial events conducted for private profit.

Adjacent Public Sidewalks

> The public sidewalks adjacent to City Hall grounds are open to the public for all lawful purposes.

The City Manager subsequently clarified that Administrative Regulation No. 5 prohibits use of the interior lobby and interior front steps of City Hall for assemblages because they "may interfere with normal business occurring within my office and other nearby offices, blockage of ingress and egress into and out of City Hall and from the first floor to the second floor, and the presence of armed security in the lobby."[4] Notwithstanding the City's express reservation in Administrative Regulation No. 5 of the use of the interior of City Hall for its government officials, COAST desires to use the interior of City Hall "for communicative activities without the necessity of associating with a City-connected sponsor or user or otherwise 'politically or administratively collaborating' with someone authorized by the City to arrange for such use for communicative activities."[5]

There is no evidence in the stipulated record that private individuals have ever been permitted independent access to hold assemblages in the interior of City Hall. From February 3, 1997, to the date the Stipulations of Fact were filed on October 21, 2008, *City officials* had arranged or requested space in City

---

[4] App. D, 71a at para. 1, Exhibit C.

[5] App. D, 99a at para. 75.

Hall for some uses for which various private individuals and organizations also *participated*.[6]

The only reason the City did not approve COAST's requested unilateral use of the interior of City Hall on two occasions under the prior regulation was because COAST "lacked a political or administrative collaboration with one of the designated City officials authorized to arrange for such use."[7] On those occasions, COAST unilaterally conducted its rally/press conference on the exterior front steps leading into City Hall.[8] The parties' Joint Stipulation of Facts includes photographs of COAST's rallies in front of City Hall.[9]

Procedural History

On August 15, 2008, COAST filed a complaint against the City of Cincinnati and, in their official capacities only,[10] City Manager Milton Dohoney, and Joel Koopman, Facilities Manager for the City of Cincinnati Division of Facilities Management (collectively, "the City"). The complaint alleged, among other things, that COAST had a constitutional right to unilaterally use the interior of City Hall for its own purposes and that the City's regulation of the use

---

[6] App. D, 73a at para. 7.

[7] App. D, 88a at para. 32.

[8] App. D, 89a at para. 33.

[9] App. D, 89a at para. 33, Exhibit Z.

[10] App D, 96a at para. 66.

of the interior of City Hall was unconstitutional. COAST contemporaneously filed a motion for temporary restraining order and preliminary injunction. COAST clearly stated its objective: "[T]he holding of a press conference and rally in the forum of the steps *inside* of City Hall would, at both the commencement and conclusion of the petition drive, be akin to the storming of the Bastille—the victory of the people over both tyranny and the arbitrary abuse of power by government officials."[11]

On August 19, 2008, the district court denied, in part, and granted, in part, COAST's motion for injunctive relief. On September 5, 2008, COAST filed an amended complaint. The City Manager adopted current Administrative Regulation No. 5 on September 9, 2008.

On November 19, 2008, the district court issued its order granting COAST's motion for preliminary injunction and denying the City's motion to dismiss. The district court broadly enjoined the City: "[T]he Court enjoins Defendants from applying Administrative Regulation No. 5 to requests for use of the interior of City Hall."

On December 3, 2008, the City timely filed its notice of appeal to the Sixth Circuit Court of Appeals. On November 17, 2009, the Sixth Circuit heard oral arguments in the case. On September 24, 2010, the Sixth Circuit held that the district court correctly held "that the plaintiffs have established a substantial

---

[11] COAST's Motion for Temporary Restraining Order and Preliminary Injunction, p. 9 (emphasis in original).

likelihood of success on two of their four claims on which they based their motion: that the City's regulation violates the plaintiff's right to free speech and that it is unconstitutionally vague. We therefore affirm."[12] On November 24, 2010, the Sixth Circuit denied the City's Petition for Rehearing En Banc.

This Petition followed.

REASONS FOR GRANTING CERTIORARI

This case raises the question of whether or not it is consistent with the free speech protections afforded by the First Amendment for a municipality to permit its own City officials to use their workplace for communicative activities, sometimes in collaboration with third parties, and exclude all non-collaborating third parties from the same space. The Sixth Circuit erred in finding that the collaboration between City of Cincinnati officials and third parties converted the interior of City Hall into a designated or limited public forum. The interior of City Hall is a non-public forum and City officials using the space for communicative activities, when collaborating with third parties and otherwise, are engaged in protected government speech not subject to First Amendment restrictions.

---

[12] *Miller, et al. v. City of Cincinnati, et al.*, 622 F.3d 524 (6th Cir. 2010). App. A, 3a.

The Sixth Circuit's determination that the City's Administrative Regulation No. 5 is not reasonably related to the purpose of the forum is inconsistent with the analyses of the First and Fourth Circuits in *Del Gallo* and *ACLU*.

In *Arkansas Educational Television Commission v. Forbes*,[13] this Court stated:

> The *Cornelius* distinction between general and selective access furthers First Amendment interests. By recognizing the distinction, we encourage the government to open its property to some expressive activity in cases where, if faced with an all-or-nothing choice, it might not open the property at all.

In contrast, the Sixth Circuit invites the City to eliminate collaborative expressive conduct in the City Hall workplace:

> Of course, the City could altogether close the interior spaces of city hall to expressive activities by private groups if it chose to do so.[14]

The Sixth Circuit's suggestion that City officials face an all-or-nothing choice is doctrinally inconsistent with longstanding Supreme Court precedent. This Court has consistently encouraged government to open its property to *some* expressive speech without

---

[13] 118 S. Ct 1633, 1642 (1998).

[14] *Miller et al., v. City et al.*, 622 F.3d 524, 535 n. 2 (6th Cir. 2010). App. A, 18a.

requiring that the government open its property to *all* expressive speech. Under the City's Administrative Regulation No. 5, City officials have the freedom to communicate messages from their City Hall workplace that have been developed in collaboration with third parties. The Sixth Circuit's decision in this case brings that process to an end.

Unlike the Sixth Circuit, the First and Fourth Circuits paid heed to the cautionary words expressed in *Arkansas Educational Television*. In *Del Gallo v. Parent*,[15] the First Circuit considered whether a postal service regulation that prohibited campaigning for election to public office on its sidewalks but permitted other forms of expressive activity violated the First Amendment. The *Del Gallo* court concluded that the post office sidewalk was a nonpublic forum. Engaging in an extensive analysis of the reasonableness of the limitation on access, the court held:"The reasonableness standard for a viewpoint-neutral restriction in a non-public forum 'is not a particularly high hurdle[,]'" and further cautioned that the reasonableness of the regulation should not be judged solely by reference to the plaintiff's particular activity, but also considered in light of the effect on all such affected premises, in that case, post offices across the country.

In *ACLU v. Mote*,[16] the Court considered a University of Maryland policy governing the use of the campus by non-students. The policy provided two areas in which non-students could engage in speech

---

[15] 557 F.3d 58 (1st Cir. 2009).

[16] 423 F.3d 438 (4th Cir. 2005).

activities, subject to satisfaction of the registration requirements. The remaining areas of the campus were closed to non-students for purposes of engaging in speech activities unless the non-student was able to obtain the sponsorship of a student or student organization. With such a sponsorship, the non-student was afforded the same access to campus facilities as the sponsor.

In *ACLU,* the plaintiff was a Lyndon Larouche supporter and sought access to the two areas on campus designated for non-student speech activities. Plaintiff was not able to reserve use of the space because all areas had been previously reserved by others. Nevertheless, plaintiff attempted to distribute leaflets without abiding by the registration requirements and without obtaining a sponsor. He was subsequently cited by campus police.

Upon review of the policy, the Fourth Circuit determined that the campus was a limited public forum and that the policy was an external standard. The Fourth Circuit further determined that the policy was viewpoint neutral and then considered whether the policy was reasonable in light of the purpose of the forum. The court stated:

> The purpose of the University is clearly to provide a venue for its students to obtain an education, not to provide a venue for expression of public views that are not requested or sponsored by any member of the campus community. While it is obviously true that there could be similarities in the content of speech by an outsider and a member of the campus

> community, that does not require them both to be treated the same.[17]

In support of his position, the Plaintiff cited *Metromedia v. Greenville-Spartanburg Airport Dist.*,[18] which involved a total ban on the placement of newspaper racks. The Court distinguished *Metromedia,* stating: "This case does not involve a total ban of speech by the general public, it merely involves a time, place, and manner restriction."[19] In finding the limitation both viewpoint neutral and reasonable in light of the purpose of the forum, the Court held:

> The University policy does not deny unsponsored outsiders access to its campus, but instead merely requires them to reserve a spot which they may do as much as five days in advance, and then speak or distribute leaflets in that part. We especially note the places for speaking or handbilling are the most visited on the campus, a distinct advantage to the speaker or handbiller. If outsiders desire to leaflet or give a speech in another area of campus, they must simply find a sponsor, and they can perform these activities anywhere on the campus. We have previously recognized that universities have limited resources, which they have an interest in reserving for members of the university community. If the University opened

---

[17] *Id.* at 444.

[18] 991 F.2d 154 (4th Cir. 1993).

[19] *ACLU*, 423 F.3d at 445.

> its entire campus to all members of the unaccompanied public, it would have to utilize a greater amount of those resources by, for instance, dispersing the limited staff throughout the campus to supervise the events. We are of opinion that this simple requirement of a sponsor is reasonable.[20]

In contrast, the Sixth Circuit, after determining that the City Hall workplace is "at most" a limited public forum (and conceding that limited public fora and nonpublic fora require the same analysis for First Amendment purposes) and identifying that the "stated" purpose of the City Hall forum is "to allow City officials to exercise their rights and responsibilities under the city Charter,"[21] summarily concluded that Administrative Regulation No. 5 is unreasonable. After finding the regulation viewpoint neutral, the court failed to identify and apply any objective criteria by which to determine whether or not the regulation was reasonably related to the purpose of the forum. Ignoring the extensive framework for reasonableness analysis established by *Cornelius*, the Sixth Circuit summarily and erroneously concluded that the regulation was not reasonably related to the purpose of the forum.

Cornelius holds: "[T]he reasonableness of the government's restriction of access to a nonpublic forum must be assessed in the light of the *purpose* of the

---

[20] *Id.* (citations omitted).

[21] *Miller*, 622 F.3d at 536. App. A, 18a.

forum and *all the surrounding circumstances*."[22] This Court further opined that the restriction on access need only be reasonable and not "the most reasonable or the only reasonable limitation."[23] Thus, in order to properly analyze whether the City's restriction is reasonably related to the purpose of the forum, the Sixth Circuit was required to identify the purpose of the forum and assess the nexus between that purpose and "all the surrounding circumstances."

On its face, Administrative Regulation No. 5 is reasonably related to the purpose of the City Hall forum. City Hall is a workplace. Administrative Regulation No. 5 governs the use of the *interior* of the City Hall workplace by designated City officials and only for those purposes that are consistent with their rights and responsibilities, as established by the City's Charter. This requirement establishes an objective line in the law. The Sixth Circuit's determination that the requirement "as drafted, bears little relationship to any official duties under the City Charter" is inconsistent with the plain language of the regulation itself.

Because Administrative Regulation No. 5, on its face, is clearly reasonably related to the purpose of the forum, the Sixth Circuit's contrary determination must derive from facts in the record. This case was presented to the district court on a stipulated record.[24]

---

[22] *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., et al.*, 105 S. Ct. 3439, 3453 (1985) (emphasis added).

[23] *Id.* at 3452.

[24] App. D.

The Joint Stipulations set forth over a hundred paragraphs and subparagraphs relating to the application and interpretation of both versions of Administrative Regulation No. 5. The Joint Stipulations contain no statements that support a finding that City officials open spaces to private parties for events they do not assist in organizing. Indeed, quite the opposite; the Joint Stipulations[25] expressly state that third parties may *participate* in assemblages in the interior spaces of City Hall only after they have *collaborated* with the individual organizing the assemblage at issue.

The collaboration at issue in this case does not convert the City Hall workplace into a forum that is available for use by third parties for their private purposes. In each instance where private parties have *participated* in an expressive activity organized by a government official, the private parties have engaged the political process and collaborated with the individual government official organizing the activity. Those who are unsuccessful at collaborating with government officials (or who choose not to collaborate) are not permitted unfettered use of City Hall. *Arkansas Educational Television*[26] upheld the exclusion of a third party candidate from a televised debate on the basis that the candidate had generated no appreciable public support. COAST was unwilling to obtain the requisite support to participate in expressive activity in City Hall. *Arkansas* held that this is a legitimate and sufficient criteria by which to

---

[25]App. D, 85a at para. 18, 86a at para. 22, 99a at para. 75.

[26] 118 S. Ct. 1633 (1998).

limit access to a nonpublic or limited public forum. Within the category of proper uses, a City official has discretion on whether or not to collaborate with a private party. In both *National Endowment for the Arts v. Finley*[27] and in *Arkansas Educational Television*, this Court upheld the government's preference between speakers so long as the distinctions were drawn on reasonable and viewpoint neutral bases.

Cincinnati City Hall is a nonpublic forum. There is no permitting system, and third parties do not have access to use the interior spaces for their own purposes. Any discretion afforded City officials under Administrative Regulation No. 5 is discretion to determine which messages to adopt as their own speech and does not regulate access to a forum for private parties to communicate their own private speech. The regulation very clearly limits the discretion of City officials' use of the spaces within City Hall to uses within their rights and responsibilities under the City Charter. Accordingly, City officials' use of the spaces within City Hall for communicative activities are subject to this restriction, which represents an objective line in the law defining the proper use of the space. Further Appellees have any number of other fora in which to communicate their message to the world, including on the outside steps of City Hall where they can and often do hold rallies and press conferences. As in both *Del Gallo* and *ACLU*, the regulation of the interior spaces of City Hall is viewpoint neutral, reasonable in light of the purpose of the forum and provides ample alternative channels for

---

[27] 118 S. Ct. 2168 (1998).

expressive conduct. Administrative Regulation No. 5 is consistent with First Amendment forum analysis principles.

The speech analyzed in this case, by government officials and their third party collaborators, is government speech that is not subject to First Amendment scrutiny.

The Sixth Circuit decision presents a conflict with this Court's *Summum*[28] decision. First and foremost, City Hall is a workplace housing the City's legislative body, the Council, the offices of the City's Mayor and the City Manager, the chief executive of the City, and the City's administrative and departmental directors and staff. The duties of each city official varies widely and the nature of their collaboration with third parties is very much dictated by their duties under the City's Charter. The City's elected officials may collaborate with third parties in order to garner support for a piece of legislation or a call to action in the community, the City's administration may collaborate with third parties in order to attract businesses or conventions to the City, and all City officials have an interest in collaborating with third parties in order to keep abreast of the important issues affecting the citizenry. Where such collaboration leads to an expressive event, such as a press conference, City officials appropriately use their City Hall workplace for such events. This is government speech and the Sixth Circuit erroneously subjected this speech to First Amendment scrutiny.

---

[28] *Pleasant Grove City, Utah v. Summum*, 129 S.Ct. 1125 (2009).

As this Court held in *Summum*, a government entity "is entitled to say what it wishes;" "to select the views that it wants to express;" and it "is the very business of government to favor and disfavor points of view."[29] "Indeed, it is not easy to imagine how government could function if it lacked this freedom."[30] And this Court further cautioned: "If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed."[31]

This Court notably reiterated in *Summum* that: "A government entity may exercise this same freedom to express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message."[32] And: "[W]here the government controls the message, 'it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources.'"[33]

---

[29] *Id.* at 1131 (citations omitted).

[30] *Id.*

[31] *Id.*, quoting *Keller v. State Bar of Cal.*, 496 U.S. 1, 12-13 (1990).

[32] *Id.*

[33] *Id.*, quoting *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 562 (2005).

But this Court went further than simply reaffirming *Johanns*.[34] *Summum* extensively analyzes the different messages or meanings that can be conveyed by a single monument such that, even where the government controls each and every word on the monument, the government's message may not be readily apparent to every observer. Nevertheless, the monument falls within the scope of government speech. If speech where the message is imprecise and open for interpretation may be characterized as government speech, certainly speech where the government's message is clear but the government hasn't controlled each and every word of the message must also be government speech. Thus, where the government collaborates with a third party to accept a monument and display it to the public, the government controls the content of the text of the monument but need not necessarily control the message in order for the monument to be considered "government speech" within the meaning of *Summum*. Where the government collaborates with third parties to express support for or against a legislative enactment or call to action and the government controls the overarching message, even where the government does not control every word expressed by a third party in support of the message delivered from the interior of City Hall, the expression is still government speech.

The Sixth Circuit misapprehended the stipulations made by the parties and their applicability to *Summum*. The Sixth Circuit contends, "Historically, governments have exercised strong 'editorial control over donated monuments,' while private individuals

---

[34] *Id.* at 1135.

can apparently access the interior of Cincinnati's city hall for assemblages on the whim of any authorized official."[35] The Sixth Circuit's use of the word "whim" distorts the *discretion* that City officials necessarily exercise in determining with which third parties each will collaborate. The discretion to determine which message to convey is an essential component of governing. But the Sixth Circuit's fundamental misapprehension is in its limited reading of *Summum*. The predominant concepts in *Summum* are identical to those in this case. Government officials are entitled to choose what they express, how they express it, and with whom they choose to collaborate. *Summum* explicitly provides government officials with these rights and the Sixth Circuit failed to analyze Administrative Regulation No. 5 in this context.

The issue of government speech inside City Hall is material to the determination of the lawfulness of the City's limitations on public access to City Hall spaces. Private parties like COAST cannot bootstrap themselves into City Hall and create parity with duly elected and appointed government officials. COAST's case is predicated upon the supposition that when public officials expressively collaborate with private parties on matters of public interest, that expression is private speech rather than government speech. COAST's theory ignores the relationship between government officials and private entities and the role private parties may play in formulating a government message.

---

[35] *Miller*, 622 F.3d at 537. App A, 21a.

This Court stated very plainly in *Summum* that "[t]he Free Speech Clause restricts government regulation of private speech; it does not regulate government speech."[36] While COAST emphasizes the participation of third parties in two isolated uses of City Hall under old Administrative Regulation No. 5, this Court has been clear that private contribution does not transform government speech into private speech. When City officials express preferences in determining whether to collaborate with one group over another, they are ultimately accountable to the citizens of the City who may choose to vote them out of office. "When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy."[37]

City of Cincinnati officials may use the inside of City Hall for expressive activities without the federal judiciary imposing a "fairness doctrine." The district court and the Sixth Circuit erred by applying a First Amendment standard of review to Administrative Regulation No. 5. This Court should reaffirm that a government entity "is entitled to say what it wishes;" "to select the views that it wants to express;" and it "is *the very business of government to favor and disfavor points of view*."[38]

---

[36] *Id.* at 1131

[37] *Bd. of Regents v. Southworth*, 529 U.S. 217, 235 (2000).

[38] *Summum*, 129 S.Ct. at 1131 (emphasis added).

Administrative Regulation No. 5, governing the use of the interior spaces of the City Hall workplace, provides an objective line in the law from which a person of ordinary intelligence could identify the applicable standard.

The Sixth Circuit declared the application of Administrative Regulation No. 5 to the City Hall *nonpublic* forum void for vagueness by relying upon an inapposite *designated* public forum decision. The Sixth Circuit further erroneously attributed subjectivity to the plainly objective standard, stating:

> The parties stipulate that the revised version of Administrative Regulation #5, as did the original, gives complete discretion to council members and department heads to select whom they will sponsor. The only direction provided is that the purpose of the interior of city hall is to allow City officials to 'exercise the rights and responsibilities specified in the Charter of the City of Cincinnati.' Without further specificity, this directive offers no meaningful guidance.[39]

The Sixth Circuit misapprehended and misapplied the void for vagueness standard set forth in *Grayned*,[40] *Finley* and *Ward*.[41] Contrary to the court's assertion, Administrative Regulation No. 5 provides clear, meaningful and sufficient guidance to City officials

---

[39] *Miller*, 622 F.3d at 540. App. A, 27a.

[40] *Grayned*, 92 S. Ct. 2294.

[41] *Ward v. Rock Against Racism*, 109 S. Ct. 2746 (1989).

and the public to discern an appropriate use of the interior spaces of City Hall.

The Sixth Circuit erroneously relied upon the inapposite *designated* public forum case, *UFCW Local 1099 v. SORTA.*, in support of its unprecedented facial application of the void for vagueness principle to a *nonpublic* forum.[42] *SORTA* itself relied upon *Grayned*, a traditional public forum case. Quoting *SORTA*, the Sixth Circuit expressed that the void for vagueness principle guards against the "danger of censorship." That is true for traditional public fora and designated public fora. The void for vagueness principle, however, is doctrinally inapplicable to a nonpublic forum like City Hall. There is no case law to the contrary.

A law governing *the conduct of the general public* may be void for vagueness if the law fails to give fair warning of what is prohibited, if it fails to provide explicit standards for the persons responsible for enforcement and thus creates a risk of discriminatory enforcement, and if its lack of clarity chills lawful behavior.[43] Administrative Regulation No. 5 regulates only the conduct of City of Cincinnati officials and not

---

[42] The Federal Circuit Court of Appeals has expressed skepticism that First Amendment facial challenges are applicable to a nonpublic forum. *Griffin, et al. v. Sec'y of Veterans Affairs*, 288 F.3d 1309, 1321-24 (Fed. Cir. 2002) ("All of the modern cases in which the Supreme Court has set forth the unbridled discretion doctrine have involved public fora, and no Supreme Court case has suggested that the doctrine is applicable outside the setting of a public forum .").

[43] *Grayned*, 92 S. Ct. at 2294.

the general public (unlike the policies in *SORTA*[44] and *Finley*).[45]

In *SORTA*, moreover, the plaintiff facially challenged SORTA's prohibition of "controversial" advertisements if the advertisements adversely affected SORTA's image or ridership. SORTA also preferred advertisements that were "aesthetically pleasing."[46] In determining that SORTA's policy controlling private access to its *designated* public forum was impermissibly vague, the court found that the policy did not require a demonstrable causality between an advertisement's "controversial" nature and an adverse impact on SORTA's interests. The Court also determined that SORTA's "aesthetically pleasing" requirement similarly invited arbitrary or discriminatory enforcement because it was not susceptible to objective definition.

There are no similar ambiguities in the City's Administrative Regulation No. 5, a regulation controlling City officials' use of a nonpublic forum. The regulation provides objective, meaningful guidance to City officials and to the public regarding the limitation on City officials' use of their City Hall workplace. There are no terms within the regulation that are subjective or require a decisionmaker to speculate as to its meaning. The Sixth Circuit summarily concluded that Administrative Regulation No. 5 "offers no meaningful guidance." However, an

---

[44] 163 F.3d 341 (6th Cir. 1998).

[45] 118 S. Ct. at 2168 (1998).

[46] 163 F.3d at 359-360.

official's "rights and responsibilities specified in the Charter" provides an explicit standard, draws a line between public and private use of City Hall by many types of City officials with different duties, and does not chill lawful behavior.

Further the Sixth Circuit's decision is conceptually inconsistent. The determination that Administrative Regulation No. 5 is both facially viewpoint neutral and void for vagueness is flawed with respect to First Amendment analysis. The void for vagueness determination can only mean that the regulation on its face is so subjective that it could be viewpoint discriminatory. The Sixth Circuit erroneously concluded that the City's regulation of the interior spaces of the City Hall workplace was void for vagueness.

CONCLUSION

Based on the foregoing, the petitioners submit that the reported decision of the Sixth Circuit Court of Appeals is in conflict with the decisions of other Circuit Courts and involves an important federal question that should be settled by this Court. Accordingly, petitioners request that this Court grant the petition for writ of certiorari.

Respectfully submitted,

Paula Boggs Muething
Assistant City Solicitor
Counsel of Record
Richard Ganulin
Assistant City Solicitor
Room 214, City Hall
801 Plum Street
Cincinnati, Ohio 45202
(513) 352-4551
(513) 352-1515 FAX
paula.boggs-muething@cincinnati-oh.gov

Counsel for Petitioners

APPENDIX

TABLE OF CONTENTS

Appendix A: Opinion and Judgment, United States Court of Appeals for the Sixth Circuit (September 24, 2010) 1a

Appendix B: Opinion and Order, United States District Court, Southern District of Ohio, Western Division (November 19, 2008) 31a

Appendix C: Order re rehearing, United States Court of Appeals for the Sixth Circuit (November 24, 2010) 68a

Appendix D: Joint Stipulations of Fact, United States District Court, Southern District of Ohio, Western Division (October 21, 2008) 70a

APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 10a0312p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 08-4679

[Filed September 24, 2010,
as corrected September 29, 2010,
and October 7, 2010]

MARK MILLER; COALITION OPPOSED TO ADDITIONAL SPENDING & TAXES; and WEDEMANDAVOTE.COM, *Plaintiffs-Appellees*,	)
v.	)
CITY OF CINCINNATI; MILTON R. DOHONEY; and JOEL KOOPMAN, *Defendants-Appellants.*	)

Appeal from the United States District Court
for the Southern District of Ohio at Cincinnati.
No. 08-00550—Michael R. Barrett, District Judge.

Argued: November 17, 2009

Decided and Filed: September 24, 2010

Before: DAUGHTREY, COLE, and GIBBONS, Circuit Judges.

COUNSEL

ARGUED: Paula Boggs Muething, CITY OF CINCINNATI, OFFICE OF THE SOLICITOR, Cincinnati, Ohio, for Appellants. Christopher P. Finney, FINNEY STAGNARO SABA & PATTERSON CO., LPA, Cincinnati, Ohio, for Appellees. **ON BRIEF:** Paula Boggs Muething, CITY OF CINCINNATI, OFFICE OF THE SOLICITOR, Cincinnati, Ohio, for Appellants. Christopher P. Finney, FINNEY STAGNARO SABA & PATTERSON CO., LPA, Cincinnati, Ohio, Curt C. Hartman, THE LAW FIRM OF CURT C. HARTMAN, Amelia, Ohio, for Appellees. Dale D. Cook, WILES, BOYLE, BURKHOLDER & BRINGARDNER CO. L.P.A., Columbus, Ohio, for Amicus Curiae.

OPINION

MARTHA CRAIG DAUGHTREY, Circuit Judge. In this section 1983 action, the plaintiffs, two political advocacy groups and an individual member of one of the groups, claim that defendant City of Cincinnati's regulation governing access to the interior spaces of city hall violates the First and Fourteenth Amendments of the United States Constitution. After ruling in the plaintiffs' favor on a jurisdictional challenge by the defendants, the district court granted

the plaintiffs' motion for a preliminary injunction. The district court concluded that the plaintiffs had established a substantial likelihood of success on the merits of four independent claims: that the challenged regulation (1) unconstitutionally prevented the plaintiffs from accessing city hall for protected-speech activities; (2) unconstitutionally restricted the plaintiffs' right of expressive association by forcing them to collaborate with a government official to gain access to city hall; (3) allowed discriminatory suppression of speech in violation of the Equal Protection Clause; and (4) was void for vagueness under the Due Process Clause. The defendants now appeal.

For the reasons that follow, we conclude that the district court correctly found it had jurisdiction to rule on the plaintiffs' motion for a preliminary injunction. The district court was also correct in holding that the plaintiffs have established a substantial likelihood of success on two of their four claims on which they based their motion: that the City's regulation violates the plaintiffs' right to free speech and that it is unconstitutionally vague. We therefore affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

The principal plaintiff, Coalition Opposed to Additional Spending & Taxes (COAST), is an Ohio political action committee that takes positions on a variety of non-partisan issues, including – in this case – opposition to the Cincinnati City Council's authority to implement an automated photo-monitoring program to enforce traffic regulations. Plaintiff Mark Miller is an individual member of COAST, and COAST, in turn,

participates in WeDemandAVote.Com, a political coalition advocating "participatory democracy." The defendants include the City of Cincinnati, city manager Milton Dohoney, and the city facilities manager, Joel Koopman.

COAST twice tried and twice failed to gain access to the interior stairs and the lobby of Cincinnati's city hall to hold a press conference and rally advocating its views. The City denied COAST's first request under the then-controlling version of Administrative Regulation #5, which provided in relevant part:

> This administrative regulation is designed to restate and clarify longstanding City policies regarding the use of public buildings . . . .
>
> No private business enterprises or solicitations should be permitted in City buildings or operated therefrom. Exceptions should be made only by specific approval of the Department Head when it is judged to be in the public interest, as in the case, for example, of the United Way Campaign.
>
> No private signs or advertising materials should be displayed on or in City buildings unless for an approved public purpose authorized by the Department Head.
>
> . . .
>
> In making any exceptions to the above policies, Department Heads are urged to consider not only what is proper, but also how it appears to the public.

In the letter denying COAST's request, defendant Koopman noted that "the use of any City facility is for conducting business related to the functions of our various departments in serving the citizens and by City Council in the performance of their duties." Koopman further explained:

> City Facility Management's practice is that events held inside the building require a City sponsor, either a Council Member or a department as part of their regular business and duties. Private groups, unaffiliated with any department or Council Member, are allowed to use the outside stairs as long as our egress is not blocked.

Koopman encouraged COAST to seek out a city department or city council member willing to sponsor a press conference and rally inside city hall or, in the alternative, to hold the event on the exterior steps.

In fact, various private groups had held events inside city hall through sponsorship by a department official or city council member under the regulation. Most notably, the backers of a tax levy for Cincinnati's public school system, which is governed by an independent school board and not the city council, held a rally on the indoor stairs of city hall that featured city council members and representatives of private community groups as speakers. The Coalition for Community Values, a private group, arranged through the office of a city council member to use a conference room in city hall for a press conference calling on a local newspaper to stop accepting adult-entertainment advertisements. No city council member was present at that press conference; however, two aides to city

council members did attend, although they did not speak.

In addition, the plaintiffs submitted as exhibits calendars that reflected use of the lobby and first floor staircase for charitable campaigns such as the United Way and for art and holiday displays. Conference rooms were booked for various non-profit events and fund-raisers, meetings of the American Society for Public Administrators, the Soccer Committee, Keep Cincinnati Beautiful (a city contractor), and the Earned Income Tax Credit Partnership/Make Work Pay, lectures relating to heart health, and the "Who Killed Our Kids?" campaign. City council chambers were used for such purposes as youth mock-trial activities and recognition ceremonies, Truman Scholarship interviews, concerts, a United Way event, a government-day program put on by the local chamber of commerce, and sessions of Leadership Cincinnati.

After COAST filed the instant action, the City revised Administrative Regulation #5 to provide in relevant part:

> City Hall is lawfully dedicated for the purpose of allowing City officials to exercise the rights and responsibilities specified in the Charter of the City of Cincinnati.
>
> . . .
>
> The interior spaces of City Hall are reserved for use by the Mayor, the City Manager and his assistants, City Councilmembers, City Department Directors, City Commissions and Boards, and City employees. The interior of City

> Hall is open to the public for purposes of visiting City officers and attending City Council and other public meetings. The interior of City hall is not generally available to the public for other purposes.
>
> When the Mayor, City Manager and his assistants, City Councilmembers, City Department Directors, and City Commissions and Boards intend to use interior spaces of City Hall for assemblages, they should notify the Facilities Management Division of the Public Services Department . . . .
>
> Facilities Management is responsible for insuring that the assemblage does not create security problems, unreasonably interfere with ingress or egress from City Hall, or otherwise unreasonably interfere with the other official uses occurring inside City Hall.

Under the revised regulation, the term "assemblages" apparently includes rallies and press conferences. City manager Dohoney instructed Koopman not to schedule any assemblages in the interior front lobby or interior stairs.

In the district court the parties stipulated that the revised regulation shares several similarities to the policy and practice under former Administrative Regulation #5. Under both, private groups seeking to hold rallies or press conferences inside city hall must "politically or administratively collaborate with the Mayor, a member of the Cincinnati City Council, the City Manager and his assistants, a City Department Director, or a City Board or Commission." The

authorized official who "sponsor[s] the use" of city hall by a private group, however, does "not necessarily need to attend the use and/or participate in the use in order for it to proceed." City officials have "full and independent discretion" as to whether they will collaborate with an outside group. Private advocates on one side of a public issue might secure sponsorship for a rally inside city hall, while advocates of the opposing viewpoint on the same issue might be denied access.

When the plaintiffs filed suit, they sought a preliminary injunction preventing the City from regulating access to city hall on the basis of the content or viewpoint of a proposed activity or from continuing to use an ad hoc, discretionary method of granting access to the building. The plaintiffs also asked the district court to order the City to allow the plaintiffs to hold a rally inside city hall. The district court granted the plaintiffs' motion for a preliminary injunction, but the district court's order does not specify whether its effect is to close city hall to outside groups regardless of sponsorship or to grant the plaintiffs access. In any event, the district court granted the City's motion to stay the preliminary injunction pending the instant appeal.

II. DISCUSSION

On appeal, the defendants raise two issues. They first challenge the district court's subject matter jurisdiction, arguing that the plaintiffs lack standing because they suffered no actionable injury and that their claims are both unripe for review and moot. The defendants also contend that the district court erred in

finding that the plaintiffs' claims are substantially likely to succeed on the merits.

A. Subject Matter Jurisdiction

"The issue of standing, and whether a federal court has the power to adjudicate a suit, is 'the threshold question in every federal case.'" *Planned Parenthood Ass'n v. City of Cincinnati*, 822 F.2d 1390, 1394 (6th Cir. 1987) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). We review jurisdictional challenges based on standing, ripeness, and mootness *de novo*. *See Monroe Retail, Inc. v. RBS Citizens, N.A.*, 589 F.3d 274, 278 (6th Cir. 2009) (standing); *In re Cassim*, 594 F.3d 432, 437 (6th Cir. 2010) (ripeness); *Demis v. Sniezek*, 558 F.3d 508, 512 (6th Cir. 2009) (mootness).

1. Standing

As to standing, the City argues that because the plaintiffs did not seek out and fail to secure sponsorship from an authorized official, they have not suffered the requisite injury in fact. The district court concluded that the plaintiffs suffered an injury when the City denied their request for access and told them to find a sponsor. We agree.

A plaintiff has constitutional standing if he: (1) shows a concrete and actual or imminent injury in fact; (2) demonstrates that the defendant's conduct caused the injury; and (3) shows that it is likely, as opposed to merely speculative, that a favorable decision will redress the injury. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Additionally, courts have recognized three prudential limitations on standing, requiring that "plaintiff be a proper

proponent, and the action a proper vehicle, to vindicate the rights asserted." *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Bd.*, 172 F.3d 397, 403 (6th Cir. 1999) (quoting *Pestrak v. Ohio Elections Comm'n*, 926 F.2d 573, 576 (6th Cir. 1991)); *see also Coyne v. American Tobacco Co.*, 183 F.3d 488, 494 (6th Cir. 1999) (prudential standing requirements summarized).

When the City instructed the plaintiffs to secure a sponsor, the City placed the plaintiffs' request at the mercy of the unfettered discretion of those officials authorized to grant access. But, as the district court observed, the Supreme Court has held that "when a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license." *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 755-56 (1988). Because unfettered governmental discretion over the licensing of free expression "constitutes a prior restraint and may result in censorship," a plaintiff may bring facial challenges to statutes granting such discretion "even if the discretion and power are never actually abused." *Id.* at 757.

In our view, both the original and revised versions of Administrative Regulation #5 afford authorized officials precisely this kind of unfettered discretion in deciding whether to sponsor an event in the interior of city hall. The defendants attempt to distinguish *City of Lakewood*, arguing that it involved a discretionary speech restriction on a public sidewalk rather than inside a government building. This distinction is irrelevant, however, because in *City of Lakewood* the

Court held that an arbitrary prior restraint on protected speech provides standing regardless of the forum. Hence, when a plaintiff's protected-speech activities are subject to restriction at the government's unfettered discretion, the plaintiff has suffered an injury in fact. We thus conclude that in this case the plaintiffs have standing to sue.

2. Ripeness

Next, the City argues that the plaintiffs' claim is not ripe because the plaintiffs have not sought collaboration with any individual authorized officials. We disagree.

The ripeness doctrine prevents courts from "entangling themselves in abstract disagreements" through premature adjudication. *Grace Community Church v. Lenox Twp.*, 544 F.3d 609, 615 (6th Cir. 2008). Courts consider three factors to evaluate ripeness: "(1) the likelihood that the harm alleged by the plaintiffs will ever come to pass; (2) whether the factual record is sufficiently developed to produce a fair adjudication of the merits of the parties' respective claims; and (3) the hardship to the parties if judicial relief is denied at this stage in the proceedings." *Id.* (quoting *Warshak v. United States*, 490 F.3d 455, 467 (6th Cir. 2007)).

Because the plaintiffs' claims are directed at the sponsorship requirement itself and do not allege that officials, in practice, exercise their discretion to grant sponsorship in a discriminatory manner, their claims are ripe. COAST has been twice denied access to city hall for noncompliance with the sponsorship requirement and has therefore been harmed.

Moreover, the factual record is sufficiently developed because the parties have stipulated to the fact that both versions of Administrative Regulation #5 require political or administrative collaboration with an authorized official and that the authorized officials have full and independent discretion to sponsor private groups and individuals, giving them access to the interior of city hall. Obviously, refusing consideration until the plaintiffs have actually sought collaboration with each and every possible collaborator in city hall would cause undue and unnecessary hardship. We therefore conclude that the challenge to the sponsorship requirement is ripe for review.

3. Mootness

Finally, the City argues that the plaintiffs' claims are moot because, following the enactment of revised Administrative Regulation #5, the city manager requested that authorized officials not schedule assemblages in the interior front lobby and stairs of city hall. Nevertheless, the plaintiffs' claims remain viable to the extent that they seek nominal damages as a remedy for past wrongs. *See Murray v. Bd. of Trustees, Univ. of Louisville*, 659 F.2d 77, 79 (6th Cir. 1981). In addition, the City does not dispute the fact that COAST's claim remains viable because other interior areas of city hall are accessible for sponsored events under the revised version of Administrative Regulation #5.

Accordingly, we conclude that the district court properly exercised subject matter jurisdiction over the plaintiffs' action.

B. Likelihood of Success on the Merits

Under well-developed authority, federal district courts balance the following factors in addressing motions for a preliminary injunction: "(1) the likelihood that the movant will succeed on the merits; (2) whether the movant will suffer irreparable harm without the injunction; (3) the probability that granting the injunction will cause substantial harm to others; and (4) whether the public interest will be advanced by issuing the injunction." *Jones v. Caruso*, 569 F.3d 258, 265 (6th Cir. 2009) (reviewing a preliminary injunction granted on First Amendment grounds). In this case, the defendants challenge the district court's ruling that there is a substantial likelihood that the plaintiffs will succeed on their free speech, expressive association, equal protection, and void-for-vagueness claims. On appeal, we review the grant of a preliminary injunction for abuse of discretion. *See id.* A district court abuses its discretion in this regard when it "relies upon clearly erroneous findings of fact, improperly applies the governing law, or uses an erroneous legal standard." *Id.*

1. First Amendment Free Speech Claim

The First Amendment prohibits the government from "abridging the freedom of speech." U.S. Const. Amend. I. Simply because the government may own a piece of property, however, does not mean that property is open to all types of expressive activity at all times. "[T]he State, no less than a private owner of property, has power to preserve the property under its control for the use which it is lawfully dedicated." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983). To determine the constitutionality

of a government restriction on speech on publicly-owned property, we consider three questions: (1) whether the speech is protected under the First Amendment; (2) what type of forum is at issue and, therefore, what constitutional standard applies; (3) whether the restriction on speech in question satisfies the constitutional standard for the forum. *See S.H.A.R.K. v. Metro Parks Serving Summit County*, 499 F.3d 553, 559 (6th Cir. 2007).

a. Forum Analysis

There is no question that the plaintiffs' proposed press conference and rally are expressive activities protected under the First Amendment. The more challenging question is what kind of forum City Hall's interior constitutes. The Supreme Court has recognized three types of public fora: the traditional public forum, the designated public forum, and the limited public forum. *See Pleasant Grove v. Summum*, 129 S. Ct. 1125, 1132 (2009). A nonpublic forum, in contrast, is a government-owned property that is not by tradition or governmental designation "a forum for public communication." *Helms v. Zubaty*, 495 F.3d 252, 256 (6th Cir. 2007). The type of forum determines the applicable constitutional standard for restrictions on expressive activities. *See Summum*, 129 S. Ct. at 1132.

i. Traditional Forum

Traditional public fora include sidewalks, parks, and other areas that by "tradition or by government fiat" are open to public assembly and debate. *Helms*, 495 F.3d at 255 (quoting *Perry*, 460 U.S. at 45). Restrictions on speech in a traditional public forum receive strict scrutiny; the government may exclude a

speaker from a such a forum "only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985).

If a publicly-owned property is not a traditional public forum, heightened First Amendment scrutiny is not automatic. *See id.*, 473 U.S. at 800-801. A government may, however, transform a publicly-owned property into a public forum by making it "a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Id.* at 802. A government "does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Id.* Governmental intent is the "touchstone" of a court's analysis in determining whether it has created a public forum. *Kincaid v. Gibson*, 236 F.3d 342, 348-349 (6th Cir. 2001) (en banc). To determine governmental intent, courts "look to the government's policy and practice with respect to the forum as well as to the nature of the property at issue and its 'compatibility with expressive activity.'" *Id.* at 349 (quoting *Cornelius*, 473 U.S. at 802).

ii. Designated Forum

The government creates a designated public forum when it opens a piece of public property to the public at large, treating as if it were a traditional public forum. *See Parks v. Finan*, 385 F.3d 694, 695-696, 699 (6th Cir. 2004) (grounds of state capitol, opened by state government for public expressive activities on a permit system, are either a traditional public forum or

designated public forum); *Church of the Rock v. City of Albuquerque*, 84 F.3d 1273, 1278 (10th Cir. 1996) (city-owned senior center is a designated public forum because, although "not a traditional location of public debate or assembly," the city opened it "to the public for discussive purposes" by permitting "lectures and classes on a broad range of subjects by both members and non-members"). As the Supreme Court held in *Summum*, "Government restrictions on speech in a designated public forum are subject to the same strict scrutiny as restrictions in a traditional public forum." 129 S. Ct. at 1132 (citing *Cornelius*, 473 U.S. at 802).

iii. Limited Forum

A government entity may "create a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects." *Summum*, 129 S. Ct. at 1132. In *Good News Club v. Milford Central Sch.*, 533 U.S. 98, 102-03, 106-07 (2001), the Supreme Court held that a public school created a limited public forum when it opened its building after hours for public meetings, subject to the permission of the administration. The government may restrict speech in a limited public forum as long as the restrictions do "not discriminate against speech on the basis of viewpoint" and are "reasonable in light of the purpose served by the forum." *Id.* at 106-07; *see also Summum*, 129 S. Ct. at 1132.[1]

---

[1] In *Summum*, the Supreme Court clarified that the designated public form and the limited public forum are distinct forum types and that restrictions on speech in a limited public forum receive lesser scrutiny than those in a designated public forum. 129 S. Ct. at 1132. This ruling resolves the confusion over terminology and scrutiny levels noted by this court and others after the Supreme

iv. Nonpublic Forum

By contrast, a nonpublic forum is a publicly-owned property that is not by tradition or governmental designation "a forum for public communication." *Helms*, 495 F.3d at 256. The government may limit access to a nonpublic forum "based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Id.* (quoting *Cornelius*, 473 U.S. at 806). In *Helms*, for example, we concluded that the reception area of a judge's office was a nonpublic forum despite the judge's "open-door policy" designed to accommodate individual members of the public to visit his office to speak with him. *Id.* at 256-57. The "small reception area" was only eight feet from an office suite the judge shared with several other county officials. *Id.* at 257. We held that the judge did not intend "to create a public 'forum for expressive activity'" open to "prolonged sit-ins" simply by making himself accessible to individuals seeking to discuss public matters with him. *Id.*

Court first articulated the concept of a "limited public forum" in *Good News Club*. *See Gilles v. Garland*, 281 F. App'x 501, 513 (6th Cir. 2008) (J. Moore, concurring); *United Food & Commercial Workers Local 1099 v. City of Sidney*, 364 F.3d 738, 750 (6th Cir. 2004) (noting confusion about terminology and proper scrutiny levels but declining to "delve deeply into the nuances of designated versus limited public forums" because it was unnecessary to the holding); *Citizens for Community Values, Inc. v. Upper Arlington Public Library Bd. of Trs.*, 2008 WL 3843579, at *5 n.3 (S.D. Ohio 2008) (noting confusion in the Sixth Circuit and elsewhere about terminology and proper scrutiny levels).

In this case, by opening the interior spaces of Cincinnati's city hall to private groups under the aegis of Administrative Regulation #5, the City has not created a traditional public forum because the regulation does not make City Hall's interior space as open to public discourse as a sidewalk or park. Nor does the regulation allow the City to treat that space as a designated public forum. Instead, Administrative Regulation #5 has created, at most, a limited public forum like that described in *Good News*. Moreover, even if we were persuaded by the City's argument that the regulation, as revised, creates only a nonpublic forum,[2] the result would be the same, because

---

[2] The City argues that under the Supreme Court's ruling in *Ysursa v. Pocatello Educational Association*, 129 S. Ct. 1093, 1098 (2009), government restrictions on speech in nonpublic fora receive only rational basis review and need not be viewpoint-neutral. We reject this argument because the Court's reasoning in *Ysursa* is entirely unrelated to forum analysis. In that case, the Court upheld Idaho's decision to ban local government employers from allowing union payroll deductions for political purposes against a First Amendment challenge. *See id.* at 1097-98. The Court observed that the state is "not required to assist others in funding the expression of particular ideas, including political ones," and noted that a state's decision not to do so by permitting payroll deductions "is not an abridgement of the union's speech" but, rather, the state's refusal to be enlisted in support of the union's speech activities. *Id.* at 1098. Because a government's "decision not to subsidize the exercise of a fundamental right does not infringe the right," the court applied rational basis review to plaintiff's claim. *Id.*

The Court's opinion in *Ysursa*, however, has no bearing on the scrutiny level applicable to Administrative Regulation #5, because the *Ysursa* Court did not engage in forum analysis in order to resolve the First Amendment dispute in that case. Hence, we reject the City's attempt to characterize COAST's request to

government limitations on speech in both a limited public forum and a nonpublic forum receive the same level of scrutiny. In both instances, any restrictions must be "reasonable and viewpoint neutral." *Summum*, 129 S. Ct. at 1132; *see also Helms*, 495 F.3d at 256.

Because the requirement of sponsorship or collaboration in this case is facially viewpoint neutral, the remaining issue is whether the requirement is reasonably related to the purpose of the forum. The stated purpose of the forum is to allow city officials to exercise their rights and responsibilities under the City Charter. But, Administrative Regulation #5 permits authorized officials to open spaces in city hall to private parties for events that they do not attend or assist in organizing. As a result, the sponsorship or collaboration requirement, as drafted, bears little relationship to any official duties under the City Charter. We therefore hold that the district court did not abuse its discretion in concluding that plaintiffs have shown a likelihood of success on the merits of their facial First Amendment challenge to the sponsorship requirement under the public forum doctrine.

---

access city hall for its rally as a request that the City subsidize its political speech by providing space. Of course, the City could altogether close the interior spaces of city hall to expressive activities by private groups if it chose to do so. The City, however, maintains a policy permitting private groups to engage in speech activities in City Hall with the discretionary sponsorship of authorized officials. As long as this policy exists, forum analysis applies.

b. Governmental Speech

On appeal, the City raises for the first time an argument that events inside city hall are exempt from First Amendment scrutiny altogether because they represent "government speech." This claim arises from the Supreme Court's recent decision in *Pleasant Grove v. Summum*, a 2009 opinion that was released after the district court issued the preliminary injunction and the City filed its notice of appeal. *See* 129 S. Ct. 1125, 1132 (2009). We conclude that this argument fails on its merits.

In *Summum*, a public park erected a donated Ten Commandments monument but rejected a monument representing another religious organization's tenets. *Id.* at 1129-30. The court found no constitutional violation, holding that the First Amendment "does not regulate government speech," and that a government entity is entitled to "select the views that it wants to express." *Id.* at 1131. In so holding, however, the court affirmed that "[w]hile government speech is not restricted by the Free Speech Clause, the government does not have a free hand to regulate private speech on government property." *Id.* at 1132. In concluding that the Ten Commandments monument was government speech rather than private speech on government land, the court noted that "[g]overnments have long used monuments to speak to the public" and that the public reasonably interprets "privately financed and donated monuments that the government accepts and displays to the public on government land" as conveying the government's views. *Id.* at 1133. *See also ACLU v. Bredesen*, 441 F.3d 370, 375 (6th Cir. 2006) (holding that a "Choose Life" license plate is government speech for First Amendment purposes because "the

government determines [the] overarching message and retains the power to approve every word disseminated") (citing *Johanns v. Lifestock Mktg. Ass'n*, 544 U.S. 550, 560-61 (2005)).

Under the Court's reasoning in *Summum*, the activities that take place in Cincinnati's city hall are not "government speech." Although government speech may involve private individuals, the connection between the events that take place inside city hall under Administrative Regulation #5 and any official government views is simply too attenuated. As we have noted, sponsoring city officials need not be involved directly in the activities that take place in city hall. Moreover, no one can reasonably interpret a private group's rally or press conference as reflecting the government's views simply because it occurs on public property. Historically, governments have exercised strong "editorial control over donated monuments," *Summum*, 129 S. Ct. at 1133, while private individuals can apparently access the interior of Cincinnati's city hall for assemblages on the whim of any authorized official.

Thus, we conclude that the doctrine of government speech does not prevent applying First Amendment scrutiny in this case.

2. First Amendment Expressive Association Claim

The district court held that the plaintiffs have shown likely success on their claim that the sponsorship requirement violates the First Amendment right of expressive association. Applying strict scrutiny, the district court reasoned that in

requiring collaboration with city officials, "Administrative Regulation #5 forces groups, such as COAST, to accept members it does not desire" and concluded that "there are means significantly less restrictive of associational freedoms by which Defendants could control the use of the interior of City Hall." The City argues that the district court erred because that Administrative Regulation #5 does nothing to interfere with COAST's membership. We agree.

The First Amendment extends beyond the right to speak to encompass the "right of expressive association," *i.e.*, the "right to associate for the purpose of speaking." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 68 (2006). The right protects "a group's membership decisions" and also protects against laws that make "group membership less attractive" without "directly interfer[ing] with an organization's composition," such as requiring groups to disclose their membership lists or imposing penalties "based on membership in a disfavored group." *Id.* at 69 (citing *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 101-02 (1982); *Healy v. James*, 408 U.S. 169, 180-84 (1972)). "The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000).

In analyzing an expressive association claim, courts use a three-step process. The first determination is whether a group is entitled to protection. *See id.* at 655. A group need not associate "for the 'purpose' of

disseminating a certain message" to be protected; it is enough that a group "engage[s] in expressive activity that could be impaired." *Id.* Political advocacy groups like COAST are the paradigmatic expressive associations entitled to protection. Second, courts ask whether the government action in question "significantly burden[s]" the group's expression, affording deference "to an association's view of what would impair its expression." *Id.* at 653. Lastly, the government's interest in any restriction must be weighed against plaintiff's right of expressive association. *See id.* at 656.

A government action does not interfere with the right of expressive association unless it directly or indirectly interferes with group membership. In *Forum for Academic & Institutional Rights*, the Supreme Court held that requiring law schools to allow military recruiters on campus as a condition of receiving federal funds did not significantly burden associational rights because "[r]ecruiters are, by definition, outsiders who come onto campus for the limited purpose of trying to hire students." 547 U.S. at 69. The statute at issue, therefore, did not "force a law school 'to accept members it does not desire.'" *Id.* The right of expressive association does not shield groups from mere "interaction" with non-members, and a group cannot invoke it simply by claiming interaction "would impair its message." *Id.* (quoting *Dale*, 530 U.S. at 653).

In this case, the plaintiffs' expressive association claim fails because nothing in Administrative Regulation #5 affects the internal membership decisions of groups seeking to use city hall for expressive activities. Officials who "sponsor" or

"collaborate" with groups to use the interior spaces do not become members of the group – they are outsiders with whom groups must interact only for the limited purpose of accessing the city hall space. Indeed, Administrative Regulation #5 requires so little interaction that the sponsoring official apparently need not help organize or even attend a sponsored event. Administrative Regulation #5, therefore, does not "significantly burden" COAST's constitutional right of association, and the district court erred in concluding that the plaintiffs' expressive association claim is substantially likely to succeed.

3. Equal Protection Claim

The district court also concluded that the plaintiffs had shown likely success on their equal protection claim. Applying strict scrutiny, the district court held that Administrative Regulation #5 was not narrowly tailored to effect a compelling government interest. On appeal, the defendants argue that the district court erred in applying strict scrutiny and that plaintiffs have no cognizable equal protection claim. We agree.

The Equal Protection Clause "protects against invidious discrimination among similarly situated individuals or implicating fundamental rights." *Scarbrough v. Morgan City Bd. of Ed.*, 470 F.3d 250, 260 (6th Cir. 2006). "The threshold element of an equal protection claim is disparate treatment; once disparate treatment is shown, the equal protection analysis to be applied is determined by the classification used by government decision-makers." *Id.* Strict scrutiny is appropriate only if a classification "infringes on a class of people's fundamental rights [or] targets a member of a suspect class." *Id.*

Neither the plaintiffs nor the district court provide more than cursory analysis of why plaintiffs' equal protection claim should receive strict scrutiny. The classification at issue is, presumably, those groups who collaborate with authorized officials to access city hall and those who do not. But because such "collaborators" and "non-collaborators" are not suspect classifications, strict scrutiny is appropriate only if the classification infringes on fundamental rights.

We conclude that strict scrutiny is inapplicable in this case. The sponsorship requirement under Administrative Regulation #5 is minimal because an official need not be actively involved with an event to sponsor it. Under the public forum doctrine described above, government officials may open publicly-owned spaces to "certain groups or for the discussion of certain topics." *Good News Club*, 533 U.S. at 106-07. Granting access to one group and not another inevitably involves classification – those invited into the forum and those who are not. The forum analysis applied above assumes such classification but does not extend strict scrutiny to limited public fora and nonpublic fora. The appropriate First Amendment standard in this case is viewpoint neutrality and rational relationship to the purpose of the forum, not strict scrutiny. *Id.*

Thus, the district court erred in applying strict scrutiny to determine whether plaintiffs had shown a likelihood of success on their equal protection claim.

4. Void-For-Vagueness Claim

The district court concluded that COAST has shown a substantial likelihood of success on its claim

that Administrative Regulation #5 is unconstitutionally vague. We agree.

In pursuing a void-for-vagueness claim, a plaintiff must establish to a court's satisfaction that "[a regulation's] prohibitive terms are not clearly defined such that a person of ordinary intelligence can readily identify the applicable standard for inclusion and exclusion." *United Food & Commercial Workers Union Local 1099 v. Southwest Ohio Regional Transit Auth.*, 163 F.3d 341, 358-59 (6th Cir. 1998) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)). The void-for-vagueness doctrine not only ensures that laws provide "fair warning" of proscribed conduct, but it also protects citizens against the impermissible delegation of basic policy matters "for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *UFCW*, 163 F.3d at 358-59 (citing *Grayned*, 408 U.S. at 108-109). Without "clear standards guiding the discretion of public officials" with enforcement authority, there is a risk that those officials will "administer the policy based on impermissible factors." *UFCW*, 163 F.3d at 358-59. As a result, laws or regulations that, for example, give officials "unbridled discretion over a forum's use" are impermissible because of the "danger of censorship and of abridgement of our precious First Amendment freedoms." *Id.* A statute that fails to constrain "an official's decision to limit speech" with "objective criteria" is unconstitutionally vague. *Id.*

In *UFCW*, for example, we held that a policy governing the selection of advertisements for city busses was unconstitutionally vague on its face. *Id.* at 363. The policy prohibited "controversial"

advertisements and required those selected to be "aesthetically pleasing" without any further guidance as to the meaning of these criteria. *Id.* at 359-60. We held that these terms were so vague that they gave officials "the power to deny a proposed ad that offends the officials' subjective beliefs and values under the guise that the ad is aesthetically displeasing [or controversial]." *Id.* at 360. Because of this "danger of arbitrary and discriminatory application," the court in *UFCW* found that the plaintiff's due process challenge was substantially likely to succeed on the merits. *Id.*

In this case, Administrative Regulation #5 provides even less guidance to officials than the advertising policy in *UFCW*. The parties stipulate that the revised version of Administrative Regulation #5, as did the original, gives complete discretion to council members and department heads to select whom they will sponsor. The only direction provided is that the purpose of the interior of city hall is to allow City officials "to exercise the rights and responsibilities specified in the Charter of the City of Cincinnati." Without further specificity, this directive offers no meaningful guidance. We conclude that the plaintiffs have established a substantial likelihood of success with regard to the merits of their void-for-vagueness claim.

III. CONCLUSION

Because the plaintiffs have established a substantial likelihood of success on their free speech and void-for-vagueness claims, there appears to be no issue as to the existence of the remaining preliminary injunction factors. As we have previously noted, "even minimal infringement upon First Amendment values

constitutes irreparable injury sufficient to justify injunctive relief." *Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989). When a constitutional violation is likely, moreover, the public interest militates in favor of injunctive relief because "it is always in the public interest to prevent violation of a party's constitutional rights." *Connection Distributing Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998).

We therefore conclude that the district court properly enjoined enforcement of Administrative Regulation #5 on the basis of the plaintiffs' free speech and void-for-vagueness claims. On these grounds, we AFFIRM the order of the district court and REMAND the case for further proceedings.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 08-4679

[Filed September 24, 2010]

MARK MILLER; COALITION OPPOSED TO ADDITIONAL SPENDING & TAXES; and WEDEMANDAVOTE.COM, Plaintiffs - Appellees,	)
v.	)
CITY OF CINCINNATI; MILTON R. DOHONEY; and JOEL KOOPMAN, Defendants - Appellants.	)

Before: DAUGHTREY, COLE, and GIBBONS, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Southern District of Ohio at Cincinnati.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the order of the district court is AFFIRMED and the case is REMANDED for further proceedings consistent with the opinion of this court.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Leonard Green, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 1:08cv550

[Filed November 19, 2008]

Mark Miller, *et al.*,	)
	)
Plaintiff,	)
	)
v.	)
	)
City of Cincinnati, *et al.*,	)
	)
Defendants.	)
	)

Judge Michael R. Barrett

OPINION & ORDER

This matter is before the Court upon Plaintiffs' Motion Preliminary Injunction. (Doc. 2) Also before the Court is Defendants' (1) Motion to Dismiss the First Amended Complaint (Doc. 19); (2) Motion to Dismiss the Second Amended Complaint (Doc. 24); Motion in *Limine* to Exclude Plaintiffs' Expert (Doc. 25); and Motion to Strike the Affidavit of Plaintiffs'

Proposed Expert (Doc. 37). The Court held a hearing on this matter on October 22, 2008. (Doc. 36)

I. BACKGROUND

Plaintiffs are an individual and two organizations who oppose the authority of the City Council to implement an automated photo-monitoring program to enforce violations of traffic laws and support the use of a system of proportional representation to elect City Counsel. (Doc. 22, ¶¶3-7) Plaintiffs also intend to engage in advocacy in the future regarding taxing and spending issues before the City of Cincinnati. (Id. ¶ 6) Plaintiffs bring this action in their own right and on behalf of a proposed class.[1] (Id. ¶ 77)

On April 28, 2008, Plaintiffs submitted a letter to Defendant Milton Dohoney, the City Manager of the City of Cincinnati. (Id. ¶¶ 9, 23 & Ex. C) Plaintiffs requested the use of the lobby and stairs inside City Hall for a press conference and rally. (Id.) This location was previously used for a rally on February 27, 2008 by the supporters of a tax levy for the Cincinnati Public Schools. (Id. ¶17) Participants and speakers

---

[1] Plaintiffs seek to certify the following class:

> Class No. 1: All individuals or organizations that wish, now or in the future, to conduct a press conference, rally or to engage in any other Communicative Activity in a Public Space inside of Cincinnati City Hall on any issue of public importance that affects the City of Cincinnati and to do so without having to obtain the sponsorship and blessing of a City-connected official or being subjected to any administrative regulation that places unfettered discretion in a City-connected official to grant permission for such press conference or rally.

included representatives from Parents for Public Schools of Greater Cincinnati, Cincinnatians Active to Support Education, the AMOS Project, and the Baptist Ministers Conference of Cincinnati and Vicinity. (Id. ¶18, 20-21 & Exs. A, B) These organizations are independent from the City of Cincinnati. (Doc. 28, ¶ 8)[2]

In a letter dated April 29, 2008, Defendant Joel Koopman, employed in the City's Division of Facility Management, responded to Plaintiffs' request. (Doc. 22, Ex. D) Koopman stated that Administrative Regulation #5 governs the use of all City buildings, offices and City workplaces. (Id.) The Regulation in effect at that time provided, in relevant part:

> No private business enterprises or solicitations should be permitted in City buildings or operated therefrom. Exceptions should be made only by specific approval of the Department Head when it is judged to be in the public interest, as in the case, for example, of the United Way Campaign.
>
> . . .
>
> In making any exceptions to the above policies, Department Heads are urged to consider not only what is proper, but also how it appears to the public.

---

[2] In addition, it was discussed at hearing on the preliminary injunction that the Cincinnati Public Schools are governed by the Cincinnati Public Schools Board, not City Council or the City Manager.

(Id.) Koopman explained that the intent of Administrative Regulation #5 is that "the use of any City facility is for conducting business related to the functions of our various departments in serving the citizens and by City Council in the performance of their duties." (Id.) Koopman also explained that: "City Facility Management's practice is that events held inside the building require a City sponsor, either a Council Member or a department as part of their regular business and duties." (Id.) Koopman closed by stating: "Should you contact one of the City departments or one of the Council Members and find agreement to sponsor this press conference and rally inside City Hall, we will gladly work with them to make this happen." (Id.). Instead of conducting the press conference and rally inside, Plaintiffs held their event outside City Hall ("the May 2008 Rally"). (Id. ¶ 25; Doc. 22, Ex. Z)

On June 9, 2008, an independent organization, Citizens for Community Values ("CCV"), held a press conference in a large conference room inside City Hall. (Id. ¶ 27 & Ex. E) At the conference, the coalition called upon a local weekly newspaper to stop publishing advertisements for adult businesses. (Id. ¶ 28) Speakers included a former City Councilmember who is a member of CCV, a former Justice Department official, and the director of another independent organization, Stepping Out 24/7 Ministries. (Id. ¶ 29)

On July 17, 2008, Plaintiffs submitted a second request to the City seeking use of the lobby and stairs inside City Hall for a second rally and press conference. (Id. ¶ 33 & Ex. F) Plaintiffs' request explains that the purposes of the rally and press conference would be to announce the results of the red

light camera petition effort. (Id., Ex. F) Koopman again responded by explaining that"[e]vents that do not have sponsorship from a City Department, the City Manager, a Council Member or the Mayor are welcome to use the exterior stairs since it is a public plaza. . . . If you should acquire sponsorship from one of the above parties, please inform us so arrangements can be made for use of the interior steps" (Id. ¶ 40 & Ex. G)

On August 6, 2008, the City Council defeated an ordinance submitted by the City Manager's Office that selected a vendor for the red light camera proposal. (Doc. 28, ¶ 62)

On August 19, 2008, this Court entered a Temporary Restraining Order which enjoined Defendants from applying Administrative Regulation #5 to requests for use of the lobby and stairs inside City Hall. (Doc. 8) The Court ordered further that no sponsored or unsponsored activities shall take place in the lobby and stairs inside City Hall except for routine ingress and egress during the pendency of the Temporary Restraining Order. (Id.) The Court found that Plaintiffs were entitled to relief because they had shown a likelihood of success on the merits of their Due Process claim. The Court found that Plaintiffs had not shown a likelihood of success on the merits of their First Amendment or Equal Protection claim.

Plaintiffs held their second rally on the stairs outside City Hall ("the August 20, 2008 rally"). (Doc. 22, Ex. Z)

Subsequent to the granting of the TRO, on September 9, 2008, the City revised Administrative

Regulation #5. The current Administrative Regulation #5 provides:

> Interior of City Hall
>
> City Hall is lawfully dedicated for the purpose of allowing City officials to exercise the rights and responsibilities specified in the Charter of the City of Cincinnati. . . .
>
> The interior spaces of City Hall are reserved for use by the Mayor, City manager and is assistants, City Councilmemers, City Department Directors, City Commissioners and Boards, and City employees. The interior of City Hall is open to the public for purposes of visiting City offices and attending City Council and other public meetings, The interior of City Hall is not generally available to the public for other purposes.
>
> When the Mayor, City Manager and his assistants, City Councilmembers, City Department Directors, and City Commissions and Boards intend to use interior spaces of City Hall for assemblages, they should notify the Facilities Management Division of the Public Services Department. That notice should be provided as far in advance of the intended use as reasonably practicable.
>
> Facilities Management is responsible for insuring that the assemblage does not create security problems, unreasonably interfere with ingress or egress from City Hall, or otherwise

> unreasonably interfere with the other official uses occurring inside City Hall.

(Doc. 22, Ex. H)

City Hall Chambers and a community room on the third floor of City Hall are subject to the Rules of Council, not Administrative Regulation #5. (Doc. 28, ¶ 2 & Ex. D) The Rules of Council provide:

> The council chamber and community room shall be under the supervision and control of the clerk of council when the council is not in session. Except as herein provided they shall be used solely by the council and its committees for the transaction of public business of the city. If not required for such use, the clerk may permit their use for the transaction of other public business. Application for such use must be made to the clerk of council. Any permission granted may be canceled or revoked by the clerk forthwith where necessary for the protection of city property, the preservation of order, the transaction of public business of the city, or other sufficient reason.

(Id.)

On September 22, 2008, Plaintiffs filed a Second Amended Complaint. Plaintiffs sought to hold a political rally in support of two ballot issues in this November's election: (1) a proposal to restrict the ability and authority of the Council of the City of Cincinnati to implement an automated photo-monitoring program to enforce claimed violations of City traffic laws; and (2) the use of a system of

proportional representation to elect the Cincinnati City Council. (Doc. 22) Plaintiffs sought to use the areas inside Cincinnati City Hall, including the inner front lobby and first floor staircase on the Plum Street side of City Hall, various conference rooms, the basement lunchroom in City Hall, and the Council Chambers in City Hall. (Id.)

In preparation for the hearing on the preliminary injunction, the parties conducted discovery and entered into a number of stipulations of fact for purposes of the hearing. The parties have submitted calendars maintained by the City for the use of certain spaces in City Hall. (Doc. 28, ¶ 6)[3] While the calendars are not complete, the dates range from February 3, 1997 to the present. (Id.)

The calendars show that the lobby and first floor staircase have been used for (1) the school tax levy rally; (2) occasional annual rallies for charitable City-sponsored giving campaigns (specifically, the United Way, United Negro College Fund, Community Shares and Fine Arts Fund); (3) tables for United Way and Fine Arts Fund solicitations during the respective City charitable giving campaigns; (4) the display of the piece of art entitled "The Memorial of Our Lost Children," comprised of shoes, toys and other items that belonged to murdered children; (5) an annual Christmas tree display and other holiday decorations; (6) another rally and press conference between 2000 and 2004 involving the Cincinnati Public Schools tax levy. (Id. ¶ 7)

---

[3] The parties stipulated that these events took place as well.

The calendars show that the basement lunchroom has been used for monthly meetings of the City's Department of Transportation and Engineering's Bike/Pedestrian Advisory Committee, and on May 9, 2006 American Bicyclists held a Bicycle Commuter Course presentation as part of the Bike/Pedestrian Advisory Committee meeting. (Id.)

The calendars show that conference room number 115 has been used for (1) a prize drawing for employee contributors to the Fine Arts Fund during the City's Fine Arts Fund campaign; (2) meetings of Keep Cincinnati Beautiful, a City contractor; (3) meeting of SEEPAC; (3) board meeting and luncheon of American Society for Public Administrators (4) press conference with Councilmember Todd Portune about bringing a professional women's soccer team to the area; (5) a meeting of the Soccer Committee, requested by Karen Ball of Councilmember Todd Portune's office; (6) a meeting of International Visitors Council, requested by City Manager's Office employee Gina Ruffin; (7) meetings for International City/County Management Association held by former City Manager during its annual convention in Cincinnati in 2000; (8) a fundraiser by a Water Works employee; (9) United Way meetings requested by Shirley Dunham of Councilmember Crowley's office and City's Public Information Officer Meg Olberding; (10) "A Taste of City Hall" fundraiser for United Negro College Fund Drive; (11) press conference requested by Department of Community Development employee Velda Boyd; (12) a Hamilton County Convention Facilities Authority meeting; (13) a meeting of EITC Partnership/ Make Work Pay, requested by Councilmember Pepper; (14) a meeting of EITC Partnership/Make Work Pay, requested by

Councilmember Pepper; (15) an Office of National Drug Policy press; (16) the City's Fine Arts Fund Campaign kickoff; (16) a Kids Voting seminar on local government, requested by Councilmember Monzel; (17) the Mayor's annual Youth in City Government program; (18) a speech by American Idol celebrity Randy Jackson about heart health, requested by Councilmember Berding; and (19) a speech by Ohio Department of Corrections Director Terry Collins about the campaign "Who killed our kids?," requested by Mayor Mallory. (Id.)

The calendars show that conference room number 169 has been used for (1) a meeting of Keep Cincinnati Beautiful; (2) a Hamilton County Convention Facilities Authority orientation meeting; and (3) an Earned Income Tax Credit meeting, requested by Carla Walker of the Mayor's office. (Id.)

The calendars show that the Council Chambers and Committee Room have been used for (1) a Cincinnati Teen Court mock trial program, requested by Councilmember Cole; (2) a Youth Recognition Ceremony, requested by Councilmember Thomas; a United Way campaign event; (3) a Green & Healthy Schools meeting; (4) Truman Scholarship interviews, as requested by Councilmember Cranley; (5) the Mayor's Concert Series; (6) an event for the City's United Way Campaign, requested by Councilmember Berding; (7) a meeting for SORTA, requested by Councilmember Bortz; (8) Government Day, hosted by the Greater Cincinnati Chamber of Commerce; (9) sessions for the Leadership Cincinnati program, arranged by the City Manager's Office. (Id.)

The parties stipulate that under both versions of Regulation #5, in order for independent individuals and organizations to participate in a rally and press conference inside of City Hall, such individuals would need to politically or administratively collaborate with the Mayor, a member of the Cincinnati City Council, the City Manager and his assistants, a City Department Director, or a City Board or Commission. (Id. ¶ 18)[4] The parties stipulate further that because of the requirement for political or administrative collaboration with City officials, it was and remains possible that advocates of one position, *e.g.*, the "Yes" position, on a ballot issue, could participate in a rally or press conference inside City Hall, and advocates of the opposite viewpoint, *e.g.*, the "No" position on the same ballot issue, could not participate in a similar rally or press conference inside City Hall unless those advocating such opposite viewpoint could also politically or administratively collaborate with one of the aforementioned individuals. (Id.)[5] The parties stipulate that under either the previous or current version of Administrative Regulation #5 the "sponsor" of an event is able to use his or her full and independent discretion in determining whether to

---

[4] The parties stipulate that there is no difference in the procedure to be followed under the past and current version of Regulation #5 for an independent person or organization to try to achieve political or administrative collaboration with a City official for purposes of conducting an assemblage inside City Hall. (Id. ¶ 22)

[5] The parties stipulate that the sponsor of an event could allow the use of such areas for an event or assemblage in support of or in opposition to issues appearing on the ballot at a forthcoming election. (Id. ¶ 16)

sponsor such use. (Doc. 28, ¶ 17)[6] Finally, the parties stipulate that under either version of Administrative Regulation #5, the sponsor of an event does not necessarily need to attend the event. (Id. ¶ 14)

Plaintiffs claim that the City's policy regarding the use of the interior of City Hall violates the First and Fourteenth Amendments to the United States Constitution in that it (i) constitutes an invalid prior restraint on speech, (ii) allows arbitrary and capricious suppression of protected speech, (iii) is vague; (iv) is overbroad; (v) permits municipal administrators to make standardless decisions based on their own excessive and unfettered discretion about which speech should be permitted and which should not, and (vi) allows content and viewpoint censorship of speech that can easily be used to prevent expression of a particular point of view, (vii) denies the equal protection rights of Plaintiffs and others and (viii) denies the due process rights of Plaintiffs. Plaintiffs have also brought a claim based upon a violation of their freedom of association.[7] Plaintiffs' claims are brought pursuant to 42 U.S.C. § 1983 and the Declaratory Judgment Act, 28 U.S.C. § 2201(a). Plaintiffs seek declaratory relief, a preliminary and permanent injunction, nominal damages, and attorney fees.

---

[6] The Court notes under the Rules of Council, the clerk of council grants or denies permission for use of Council Chambers when not in use by Council.

[7] The parties' discussion of this claim has been limited. Plaintiffs argue in a footnote in their Supplemental Brief in support of the Motion for Preliminary injunction that their freedom of expressive association is at issue.

II. ANALYSIS

A. Motion to Dismiss

Defendants argue that this Court lacks jurisdiction because Plaintiffs' claims are not ripe and Plaintiffs lack standing. Federal Rule of Civil Procedure 12(h)(3) instructs this Court to dismiss an action "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter." Defendants also argue pursuant to Federal Rule of Civil Procedure 12(b)(6) that Plaintiffs have failed to state a claim.

1. First Amended Complaint

Defendants filed their Motion to Dismiss the First Amended Complaint (Doc. 19) before Plaintiffs filed their Second Amended Complaint. The general rule is that an amended pleading supersedes the original and remains in effect, unless again modified, from that point forward. *Hartman v. Register*, 2007 WL 915193, *5 (S.D.Ohio March 26, 2007) (unpublished), *citing* 6 Wright, et al., Federal Practice & Procedure § 1476, at 556-57 (2nd ed. 1990 & Supp. 2001). Once an amended pleading is filed, the original pleading no longer performs any function in the case. *Id.* Accordingly, Defendants' Motion to Dismiss the First Amended Complaint is DENIED as MOOT. The Court will, however, consider arguments contained within the Motion to Dismiss the First Amended Complaint to the extent that they are incorporated by reference in Defendants' Motion to Dismiss the Second Amended Complaint (Doc. 24).

2. Standing

Standing is a jurisdictional matter and is a threshold question to be resolved by the court before a court may address any substantive issues. *Planned Parenthood Ass'n v. City of Cincinnati*, 822 F.2d 1390, 1394 (6th Cir. 1987). To establish standing, a plaintiff must show: (1) that he or she suffered an injury in fact, which is both concrete and actual or imminent; (2) that the injury is caused by the defendant's conduct; and (3) that it is likely, as opposed to speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). In addition, "[p]rudential limitations dictate that 'the plaintiff must be a proper proponent, and the action a proper vehicle, to vindicate the rights asserted.'" *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Bd.*, 172 F.3d 397, 403 (6th Cir. 1999), *quoting Pestrak v. Ohio Elections Comm'n*, 926 F.2d 573, 576 (6th Cir. 1991).

Defendants argue that Plaintiffs have not suffered an injury in fact because they have not sought a City sponsor for their press conference and rally, either under the previous or current version of Administrative Regulation #5.

Plaintiffs shown an injury in fact based on Defendants' denial oftheir request to hold their press conference and rally inside the lobby and stairs of City Hall. In addition, the Supreme Court has "long held that when a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a

license. *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 755-756 (1988). The Supreme Court has explained that there are "two major First Amendment risks associated with unbridled licensing schemes: self-censorship by speakers in order to avoid being denied a license to speak; and the difficulty of effectively detecting, reviewing, and correcting content-based censorship 'as applied' without standards by which to measure the licensor's action." *Id.* at 759. "Therefore, a facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers." *Id.*

Here, the parties have stipulated that under Administrative Regulation #5 the sponsor of an event is able to use his or her full and independent discretion in determining whether to sponsor such use. Plaintiffs allege that as a result, City officials have unbridled discretion in determining who is permitted to conduct events inside City Hall. Therefore, a facial challenge is appropriate, and Plaintiffs have standing to bring their claims against Defendants.

3. Ripeness

To determine whether a claim is ripe, this Court must consider (1) the likelihood that the injury alleged by the plaintiff will ever occur; (2) whether the factual record is sufficiently developed to allow for adjudication; and (3) the hardship to the parties from refusing consideration. *Norton v. Ashcroft*, 298 F.3d 547, 554 (6th Cir. 2002). However, this ripeness analysis "is somewhat relaxed in the First Amendment context." *Lawrence v. Welch*, 531 F.3d 364, 374 (6th

Cir. 2008), *quoting Norton*, 298 F.3d at 554; *see also Currence v. City of Cincinnati*, 2002 WL 104778, *3 (6th Cir. Jan. 24, 2002) (unpublished) ("Ripeness analysis is relaxed for the First Amendment cases involving a facial challenge to a regulation because courts see a need to prevent the chilling of expressive activity."), *citing Bill Richardson v. Gonzales*, 64 F.3d 1495, 1500 (10th Cir. 1995).

Plaintiffs have shown that it is likely that the alleged injury will occur because on two previous occasions Defendants have denied Plaintiff's request to use the interior of City Hall because Plaintiffs did not have a sponsor for their event.[8] Next, the factual record is sufficiently developed to allow for adjudication. There are very little, if any, disputed facts, and this case largely turns on issues of law. *See Currence*, 2002 WL 104778, at *3. The central dispute is whether the Administrative Regulation #5 violates the Constitution by requiring a sponsor for an event held inside City Hall. Finally, it is clear that if this Court refuses consideration, Plaintiffs will not know if they will be permitted to hold future events inside City Hall, thereby creating an undue hardship. Therefore, the Court concludes that Plaintiffs' claims are ripe for adjudication.

---

[8] However, the Court finds that any challenge Plaintiffs bring based upon Defendants "selectively and discriminatorily" allowing access to specific interior spaces (See Doc. 33, at 6) is not ripe. Plaintiffs did not seek sponsorship of their event, therefore their challenge can only be based upon the constitutionality of the sponsorship requirement itself.

4. Mootness

Defendants have argued that Plaintiffs' claims are moot because Administrative Regulation #5 has been amended. However, based on the stipulations of the parties, it appears that the current version of Administrative Regulation #5 is no different from Defendants' interpretation and application of the previous Administrative Regulation #5 in that independent individuals and groups must find a sponsor to hold an event inside City Hall. Moreover, because nominal damages are a symbolic remedy for past wrongs, a prayer for nominal damages precludes a finding of mootness, even when the defendant has altered or abandoned the allegedly unconstitutional policy forming the basis for the plaintiff's complaint. *Murray v. Bd. of Trs., Univ. of Louisville*, 659 F.2d 77, 79 (6th Cir. 1981) (remanding First Amendment case to district court for adjudication of plaintiff's nominal-damage claim); *see also Blau v. Ft. Thomas Pub. Sch. Dist.*, 401 F.3d 381, 387 (6th Cir. 2005) (explaining that "even if [the plaintiff's] matriculation from middle school to high school mooted the claim for injunctive and declaratory relief (a point we need not decide), the existence of a damages claim ensures that this dispute is a live one and one over which Article III gives us continuing authority"). Therefore, the Court concludes that Plaintiffs' claims are not moot.

5. Failure to state a claim

In reviewing a motion to dismiss for failure to state a claim, this Court must "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *Bassett v. National Collegiate*

Athletic Ass'n, 528 F.3d 426, 430 (6th Cir. 2008), *quoting Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007). However, the factual allegations contained in a complaint must "raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 127 S.Ct 1955, 1965 (2007).

Plaintiffs bring claims for violations of the First and Fourteenth Amendments. Plaintiffs claim that the City has created a limited or designated forum inside City Hall based on the types of events held there. Plaintiffs claim that even if the areas inside City Hall at issue are nonpublic fora, Administrative Regulation #5 is unconstitutional because it is a prior restraint on speech, and is overbroad and vague. Specifically, Plaintiffs allege that the sponsorship requirement of Administrative Regulation #5 violates their right to free speech. Plaintiffs further claim due process and equal protection violations based upon the free speech violations. The Court finds the allegations in Plaintiffs' Second Amended Complaint are sufficient to state a claim for violations under the First and Fourteenth Amendments. Based on the foregoing, the Court DENIES Defendants' Motion to Dismiss.

B. Motion *in Limine* and Motion to Strike

Defendants argue that this Court should preclude Plaintiffs from introducing the testimony of their proposed expert, Mark Weaver. Because Weaver's testimony was not presented at the hearing on the preliminary injunction, the Court hereby DENIES AS MOOT Defendants' Motion in Limine.

However, Plaintiffs have presented Weaver's affidavit in support of their motion for preliminary

injunction. Defendants seek an order striking that affidavit pursuant to Federal Rules of Evidence 403 and 702 because Weaver's testimony does not meet the *Daubert* requirements, embraces legal conclusions, does not assist the trier of fact, and the probative value of the testimony is substantially outweighed by the danger of unfair prejudice.

Federal Rule of Evidence 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

An expert witness is generally prohibited from testifying on issues of law. *Berry v. City of Detroit*, 25 F.3d 1342, 1353 (6th Cir. 1994) ("Although an expert's opinion may embrace an ultimate issue to be decided by the trier of fact, Fed.R.Evid. 704(a), the issue embraced must be a factual one."). However, this prohibition is not applicable where the court is sitting as both a trier of fact and law. *See Grand Traverse Band of Ottawa and Chippewa Indians v. U.S. Atty. for Western Dist. of Mich.*, 46 F.Supp.2d 689, 694 (W.D.Mich. 1999) (finding that expert's affidavit properly provides evidence of a factual nature that is not barred by Rules 702 or 704; and the court, sitting

as both trier of fact and of law on a motion for preliminary injunction, is fully able to disregard the implication of any impermissible legal conclusion); *Knisley v. U.S.*, 817 F.Supp. 680, 690 (S.D.Ohio 1993) (finding that any possible concern over invasion of the judge-jury relationship is not present in cases tried to the bench). Accordingly, in deciding the motion for preliminary injunction, the Court finds it unnecessary to strike Weaver's affidavit under Federal Rule of Evidence 702.

Federal Rule of Evidence 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Like Federal Rule of Evidence 702, Rule 403 has no application where the court sits as both trier of fact and law. In the context of a bench trial, the application of the unfair prejudice portion of Rule 403 has been seen as an unnecessary and "useless procedure." *U.S. v. Hall*, 2000 WL 32010, *2 (6th Cir. Jan. 4, 2000) (unpublished), *citing* 22 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5213 (1978 & Supp 1999) ("Since the judge must hear the evidence in ruling on the motion to exclude the evidence under Rule 403, exclusion of the evidence on grounds of prejudice in a bench trial is described as a 'useless procedure.' "); *Schultz v. Butcher*, 24 F.3d 626, 632 (4th Cir. 1994) (finding court should not exclude evidence under Rule 403 in bench trial on grounds of unfair prejudice); *Gulf States*

Utilities Co. v. Ecodyne Corp., 635 F.2d 517, 519 (5th Cir.1981) (finding unfair prejudice portion of Rule 403 "has no logical application to bench trials"). While the Court questions the relevance of the information in Weaver's affidavit, the Court finds that it need not be excluded under Federal Rule of Evidence 403. Accordingly, Defendants' Motion to Strike the Affidavit of Plaintiffs' Proposed Expert is DENIED.

C. Preliminary injunctive relief standard

Under Federal Rule of Civil Procedure 65, injunctive relief is an extraordinary remedy whose purpose is to preserve the *status quo*. In when determining whether to grant or deny a preliminary injunction, this Court must consider four factors: (1) whether the movant has a strong likelihood of success on the merits, (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction. *Chabad of S. Oh. & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427, 432 (6th Cir. 2004), *quoting Blue Cross & Blue Shield Mut. of Ohio v. Columbia/HCA Healthcare Corp.*, 110 F.3d 318, 322 (6th Cir. 1997). In First Amendment cases, the first factor will often be determinative. *Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson County, Tennessee*, 274 F.3d 377, 400 (6th Cir. 2001), *citing Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998).

C. Section 1983

Section 1983 creates no substantive rights, but merely provides remedies for deprivations of rights established elsewhere. *Tuttle v. Oklahoma City*, 471 U.S. 808 (1985). Section 1983 has two basic requirements: (1) state action that (2) deprived an individual of federal statutory or constitutional rights. *Flint v. Kentucky Dept. of Corrections*, 270 F.3d 340, 351 (6th Cir. 2001), *citing Bloch v. Ribar*, 156 F.3d 673, 677 (6th Cir.1998) *and United of Omaha Life Ins. Co. v. Solomon*, 960 F.2d 31, 33 (6th Cir.1992). There appears to be no dispute that Plaintiffs have shown state action. Instead, Defendants argue Plaintiffs have not made an adequate showing of a constitutional violation.

D. First Amendment

The First Amendment prohibits the government from "abridging the freedom of speech." U.S. Const. amend. I. The First Amendment, however, does not guarantee that all forms of protected speech may be heard on property owned or controlled by the government. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983). Instead, "the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Id.*

To determine whether the government has violated an individual's free speech rights, the Sixth Circuit employs a three-step analysis: (1) we ask whether the speech is protected under the First Amendment; (2) if so, using the public-forum doctrine, we ascertain whether the applicable forum is public or nonpublic;

and (3) applying the appropriate standard for the forum, we ask whether the government's prohibition on speech passes muster under the First Amendment. *S.H.A.R.K. v. Metro Parks Serving Summit County*, 499 F.3d 553, 559 (6th Cir. 2007).

1. Protected speech

The parties agree that the proposed speech–a press conference and rally–is protected speech under the First Amendment.

2. Nature of the forum

There are three types of public fora: "the traditional public forum, the public forum created by government designation, and the nonpublic forum." *Jobe v. City of Catlettsburg*, 409 F.3d 261, 266 (6th Cir. 2005), *citing Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985).

"A traditional public forum is a place 'which by long tradition or by government fiat has been devoted to assembly and debate,' such as a street or a park." *Kincaid v. Gibson*, 236 F.3d 342, 348 (6th Cir. 2001), *quoting Perry*, 460 U.S. at 45. The government can exclude a speaker from a traditional public forum "only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Cornelius*, 473 U.S. at 800.

The second type of forum has been alternatively described as a "limited public forum," and as a "designated public forum." *Kincaid*, 236 F.3d at 348 (citations omitted); *see also Cornelius*, 473 U.S. at 802 (explaining that the government may create a public

forum by its designation of "a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects."). As this Court has recently explained, the Sixth Circuit uses the terms "designated public forum" and "limited public forum" interchangeably. *Citizens for Community Values, Inc. v. Upper Arlington Public Library Bd. of Trustees*, 2008 WL 3843579, *5 (S.D.Ohio 2008) (slip op.). However, the Sixth Circuit applies differing levels of scrutiny for each. *Id.* Where there is a designated public forum, the same standards apply as apply to traditional public fora. *Id., citing Pouillon v. City of Owosso*, 206 F.3d 711, 715 (6th Cir. 2000). Where the forum has been open to just certain categories of speakers and subjects, the Sixth Circuit applies a lesser level of scrutiny. *Id.* In such instances, government restrictions on speech must be viewpoint-neutral and reasonable in light of the purpose of the forum. *Id., citing Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-107 (2001); *see also United Food & Commercial Workers Local 1099 v. City of Sidney*, 364 F.3d 738, 750 (6th Cir. 2004) (explaining that where the state reserves fora "for certain groups or for the discussion of certain topics," government restrictions on speech must be reasonable and viewpoint neutral, which are the same standards that apply to restrictions on speech in nonpublic forums).

Finally, where there is a nonpublic forum, the government may control access "based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Kincaid*. 236 F.3d at 348, *citing Cornelius*, 473 U.S. at 806; *Perry*, 460 U.S. at 46.

Plaintiffs argue that Defendants have created either a limited or designated public forum inside City Hall. Defendants argue that this area is a nonpublic forum.

When determining the nature of the forum, the "touchstone of [a court's] analysis is whether the government intended to open the forum at issue." *Kincaid*. 236 F.3d at 348-49 (citations omitted). "To determine whether the government intended to create a limited public forum, we look to the government's policyand practice with respect to the forum, as well as to the nature of the property at issue and its 'compatibility with expressive activity.'" *Id.*, *quoting Cornelius*, 473 U.S. at 802.

In Administrative Regulation #5, the stated purpose of City Hall is to allow "City officials to exercise the rights and responsibilities specified in the Charter of the City of Cincinnati." However, Defendants' stated purpose regarding the use of the interior of City Hall, without more, is not dispositive. This Court must closely examine whether in practice Defendants have consistently enforced the written policy. *United Food & Commercial Workers Union v. Southwest Ohio Regional Transit Authority*, 163 F.3d 341, 352-53 (6th Cir. 1998). The Court notes that a variety of events have been held by independent individuals and organizations who are not City officials. These events were open to the public, and were only related to the exercise of the rights and responsibilities of the City officials in the most general sense. The City official who sponsors an event is not required to be present at the event, and is often not present. It is clear that City officials use the interior of City Hall however and whenever they desire, without

regard to any limitations. The current version of Adminstrative Regulation #5 does nothing to alter this practice. City officials only need to give notice to the Facilities Management Division "as far in advance of the intended use as reasonably practicable."

In addition, the nature of the areas inside City Hall identified by Plaintiffs are compatible with expressive activity. In so finding, the court is cognizant that the Supreme Court has warned that:

> In cases where the principal function of the property would be disrupted by expressive activity, the Court is particularly reluctant to hold that the government intended to designate a public forum. Accordingly, we have held that military reservations and jailhouse grounds do not constitute public fora.

Cornelius, 473 U.S. at 804 (citations omitted). As this Court previously noted, the principle function of the lobby and stairs inside City Hall is to serve as an entrance to the building. However, supporters of the school tax levy issue were able to hold a large press conference and rally in this area. Such an event, held on an occasional basis, shows a compatibility with expressive activity. As the Sixth Circuit has instructed: "forum analysis must involve a careful scrutiny of whether the government-imposed restriction on access to public property is truly part of 'the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property.'" *UFCW*, 163F.3d at 351-52, *quoting Perry*, 460 U.S. at 49. Administrative Regulation #5 does nothing to limit a City official from sponsoring such an event in any area inside City Hall, on any subject, at any time of

the day. As the Sixth Circuit has explained: "if the 'concept of a designated open forum is to retain any vitality whatever,' we will hold that the government did not create a public forum only when its standards for inclusion and exclusion are clear and are designed to prevent interference with the forum's designated purpose." *Id.* at 352, *quoting Christ's Bride Ministries, Inc. v. Southeastern Pa. Transp. Auth.*, 148 F.3d 242, 251 (3d Cir. 1998). Here the only clear restriction on access to the interior of City Hall is sponsorship of a City official. There is little about this restriction which would prevent interference with the forum's designated purpose of allowing City officials to exercise the rights and responsibilities under the Charter. While this Court previously found that the lobby and stairs inside City Hall are a nonpublic forum, in light of the evidence presented by Plaintiffs as to the use of this area, as well as the other areas inside City Hall, this Court finds that the inner front lobby and first floor staircase on the Plum Street side of City Hall, various conference rooms, and the basement lunchroom in City Hall are limited or designated public fora.

3. Applicable standard for the forum

The Court finds that the interior of City Hall has been open to one category of speakers–those speakers who have the sponsorship of a City official. Therefore, the lesser level of scrutiny is applicable, and Defendants' restriction on speech must be viewpoint-neutral and reasonable in light of the purpose of the forum. The sponsorship requirement is viewpoint-neutral on its face. Even though the City has stipulated that Administrative Regulation #5 could be applied in such a manner as to discriminate on the

basis of viewpoint, the issue of viewpoint discrimination is not before this Court. Plaintiffs have not sought a sponsor for their events, and therefore cannot claim a violation of the First Amendment on this basis.

However, the Court finds that the sponsorship requirement is not reasonably related to the purpose of the forum. The stated purpose of the forum is to allow City officials exercise their rights and responsibilities under the City Charter. The sponsorship requirement only minimally limits speakers and the topics to those related to the work of City officials.

Therefore, the Court concludes that Plaintiffs have shown a likelihood of success on the merits of their First Amendment claim to the extent that it is based upon a facial challenge under the public-forum doctrine.

4. Freedom of association

The Supreme Court has recognized a First Amendment right to associate for the purpose of speaking, which it has termed a "right of expressive association." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547U.S. 47, 68 (2006). The rationale is that "[t]he right to speak is often exercised most effectively by combining one's voice with the voices of others." *Id., citing Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984).[9] The Supreme Court

---

[9] As the Supreme Court explained in *Roberts*: "An individual's freedom to speak, to worship, and to petition the government for

has also recognized that the freedom to associate "plainly presupposes a freedom not to associate." *Roberts*, 468 U.S. at 623.

The Supreme Court uses a three-step process to analyze an expressive association claim. *Boy Scouts of America v.* Dale, 530 U.S. 640, 648 (2000). First, the Court considers whether the group making the claim engaged in expressive association. *Id.* Second, the Court analyzes whether the governmental action at issue significantly affected the group's ability to advocate public or private viewpoints. *Id.* at 653. Finally, the Court weighs the governmental interest implicated in the action against the burden imposed on the associational expression to determine if the governmental interest justified the burden. *Id.* at 656.

Under this analysis, the Court finds that Plaintiffs engage in expressive association. The parties have stipulated that Plaintiff Miller is a member, supporter and agent of COAST. The parties have stipulated that Plaintiff COAST is an association of individuals organized as a political action committee devoted to advocacy on issues related to limits on the power and intrusiveness of government. Next, the Court finds that the Administrative Regulation #5 significantly affects Plaintiffs' ability to advocate their public viewpoints in that they are unable to hold events inside City Hall.

---

the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed." *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984), *citing Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, 454 U.S. 290, 294 (1981).

At the final step, the Court must weigh Defendants' interest in having the sponsorship requirement in place against the burden imposed on Plaintiffs' associational expression. Government action impermissibly burdens the freedom to associate by "interfer[ing] with the internal organization or affairs of the group." *Roberts*, 468 U.S. at 623. The Supreme Court has held that "[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire." *Id.* Where the presence of the unwelcome person "affects in a significant way the group's ability to advocate" its viewpoint, the government has infringed on the group's freedom of expressive association. *Dale*, 530 U.S. at 648, *citing New York State Club Assn., Inc. v. City of New York*, 487 U.S. 1, 13 (1988). However, the freedom of expressive association is not absolute. *Id.* The right of expressive association "may be overridden 'by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.' " *Id.*, *quoting Roberts*, 468 U.S. at 623.

Administrative Regulation #5 forces groups, such as COAST, to accept members it does not desire. Specifically, it requires a group to find a City official willing to support its viewpoint in order to garner sponsorship of an event or "assemblage." The Court finds that this forced sponsorship affects in a significant way COAST's ability to advocate its viewpoint because without sponsorship, Plaintiffs are not permitted to hold an event inside City Hall. Therefore, Defendants have infringed on the group's freedom of expressive association. The Court must

next determine whether this right may be overridden. That inquiry centers on Defendants' compelling interest. Administrative Regulation #5 states that Facilities Management is to ensure that the use of the interior of City Hall does not create security problems, unreasonable interference with ingress and egress from City Hall, or unreasonable interference with the other official uses occurring inside City Hall. Based on the foregoing, the Court finds that Defendants have a compelling interest in controlling the use of the interior of City Hall so that City officials are permitted to exercise their rights and responsibilities under the Charter.

However, the Court finds that there are means significantly less restrictive of associational freedoms by which Defendants could control the use of the interior of City Hall. Currently, the only means by which an individual or group may use the interior of City Hall is by finding a sponsor for their event. Therefore, an individual or group has no other avenue other than associating themselves with a City official if they want to hold an event inside City Hall. Therefore, the Court finds that the Plaintiffs have shown a likelihood of success on the merits of their freedom of expressive association claim.

E. Equal Protection

A statute challenged on equal protection grounds will be subject to strict scrutiny when the statute involves a "suspect" classification or has an impact on a "fundamental" right. *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Bd.*, 172 F.3d 397, 410 (6th Cir. 1999), *citing Clark v. Jeter*, 486 U.S. 456, 461 (1988). The First

Amendment right to free speech and freedom of association are such fundamental rights. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 101 & n. 8 (1972); *see Brown v. Alexander*, 718 F.2d 1417, 1425 (6th Cir. 1983) (stating that the freedom of association is a fundamental First Amendment right). Because First Amendment rights are impacted by Administrative Regulation #5, strict scrutiny is appropriate.

Strict scrutiny requires the government "to show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Perry*, 460 U.S. at 45. While Defendants have a compelling state interest in controlling the use of the interior of City Hall, the Court finds that Administrative Regulation #5 is not narrowly drawn to achieve that end. Administrative Regulation #5 provides no guidance as to how Facilities Management is to ensure that the use of the interior of City Hall does not create security problems, unreasonable interference with ingress and egress from City Hall, or unreasonable interference with the other official uses occurring inside City Hall.

Based on the foregoing, the Court finds that Plaintiffs are likely to succeed on the merits of their Equal Protection claim.

F. Due Process

The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV, § 1. Plaintiffs' due process claim is based upon vagueness and overbreadth doctrines. Plaintiffs argue that

Administrative Regulation #5 lacks objective standards for deciding what speech is permitted inside City Hall.

Imprecise laws can be attacked on their face under two different doctrines. *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999). First, the overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when "judged in relation to the statute's plainly legitimate sweep." *Id.*, *quoting Broadrick v. Oklahoma*, 413 U.S. 601, 612-615 (1973). Second, even if an enactment does not reach a substantial amount of constitutionally protected conduct, it may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests. *Id.*, *citing Kolender v. Lawson*, 461 U.S. 352, 358 (1983).

The overbreadth doctrine is "an exception to traditional rules of standing and is applicable only in First Amendment cases in order to ensure that an overbroad statute does not act to 'chill' the exercise of rights guaranteed protection." *Leonardson v. City of East Lansing*, 896 F.2d 190, 195 (6th Cir. 1990), *citing NAACP v. Button*, 371 U.S. 415, 433 (1963). "Facial challenges to overly broad statutes are allowed not primarily for the benefit of the litigant, but for the benefit of society-to prevent the statute from chilling the First Amendment rights of other parties not before the court." *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 958 (1984). Therefore, "[i]n order for a statute to be found unconstitutional on its face on overbreadth grounds, 'there must be a realistic danger

that the statute itself will significantly compromise recognized First Amendment protections of parties not before the court.' " *Leonardson*, 896 F.2d at 195, *quoting City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984). Plaintiffs have not identified any realistic danger that City Administrative Regulation #5 will significantly compromise the First Amendment rights of parties not before the Court. As such, the Court finds that Plaintiffs have not shown a likelihood of success on the merits of this claim. *Accord Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973) (explaining that the overbreadth doctrine is "strong medicine" that is used "sparingly and only as a last resort.").

However, the Court does find merit in Plaintiffs' claim under the vagueness doctrine. Under the First Amendment, speakers are protected from arbitrary and discriminatory enforcement of vague standards. *National Endowment for the Arts v. Finley*, 524 U.S. 569, 588 (1998). Due process requires that this Court hold a statute, ordinance, or resolution void for vagueness "if its prohibitive terms are not clearly defined such that a person of ordinary intelligence can readily identify the applicable standard for inclusion and exclusion." *UFCW*, 163 F.3d at 358-59. In addition, "[t]he absence of clear standards guiding the discretion of the public official vested with the authority to enforce the enactment invites abuse by enabling the official to administer the policy on the basis of impermissible factors." *Id.* at 359. As the Sixth Circuit has explained:

> Quite simply, the danger of censorship and of abridgment of our precious First Amendment freedoms is too great where officials have

> unbridled discretion over a forum's use." *Id.*, *citing Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975). We will not presume that the public official responsible for administering a legislative policy will act in good faith and respect a speaker's First Amendment rights; rather, the vagueness "doctrine requires that the limits the [government] claims are implicit in its law be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 770, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988).

Id.

The Court finds that the terms of Administrative Regulation #5 are not clearly defined. The only direction the Regulation provides is that the purpose of the interior of City Hall is to allow City officials "to exercise the rights and responsibilities specified in the Charter of the City of Cincinnati." There are no clear standards which would guide a City official to judge whether a use fell within this specified purpose. As such, the Court finds that Plaintiffs are likely to succeed on the merits of their due process claim based upon the doctrine of vagueness.

The Court also finds that the remaining preliminary injunction factors weigh in favor of Plaintiffs. "The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief." *Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989). Additionally,

if the plaintiff shows a substantial likelihood that the challenged law is unconstitutional, no substantial harm to others can be said to inhere in its enjoinment. *Deja Vu*, 274 F.3d at 400. Moreover, "it is always in the public interest to prevent violation of a party's constitutional rights." *Connection Distributing Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998), *quoting G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994). Therefore, the Court concludes that Plaintiffs are entitled to a preliminary injunction enjoining the application of Administrative Regulation#5. Accordingly, the Court enjoins Defendants from applying Administrative Regulation #5 to requests for use of the interior of City Hall.

G. Qualified immunity

In their Motion to Dismiss, Defendants argue that to the extent that the individual defendants are named in their individual capacities, they are entitled to have those claims dismissed based on qualified immunity. However, the parties subsequently stipulated that Defendants Dohoney and Koopman are sued only in their official capacities. (Doc. 28, ¶ 66) Therefore, Defendants' Motion to Dismiss is DENIED on the basis of qualified immunity.

III. CONCLUSION

Based on the foregoing, it is hereby **ORDERED** that:

1. Defendant's Motion to Dismiss the First Amended Complaint (Doc. 19) is **DENIED as MOOT**.

2. Motion in *Limine* to Exclude Plaintiffs' Expert (Doc. 25) is **DENIED as MOOT**;

3. Motion to Strike the Affidavit of Plaintiffs' Proposed Expert (Doc. 37) is **DENIED**;

4. Plaintiffs' Motion for Preliminary Injunction (Doc. 2) is **GRANTED**; and

5. Motion to Dismiss the Second Amended Complaint (Doc. 24) is **DENIED**.

IT IS SO ORDERED.

/s/ Michael R. Barrett
Michael R. Barrett, Judge
United States District Court

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 08-4679

[Filed November 24, 2010]

MARK MILLER, ET AL.,	)
	)
Plaintiffs-Appellees,	)
	)
v.	)
	)
CITY OF CINCINNATI, ET AL.,	)
	)
Defendants-Appellants.	)
	)

ORDER

BEFORE: DAUGHTREY, COLE, and GIBBONS, Circuit Judges.

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the

petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Leonard Green, Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 1:08-cv-00550
Judge Barrett

[Filed October 21, 2008]

MARK MILLER, et al., individually and on behalf of all others similarly situated,	)
Plaintiffs,	)
v.	)
CITY OF CINCINNATI, et al.,	)
Defendants.	)

JOINT STIPULATIONS OF FACT

Now come Plaintiffs, MARK MILLER, COALITION OPPOSED TO ADDITIONAL SPENDING & TAXES ("COAST") and WEDEMANDAVOTE.COM, individually and on behalf of all others similarly situated, and the Defendants, CITY OF CINCINNATI, MILTON DOHONEY, AND JOEL KOOPMAN, and

hereby stipulate the following facts for this Court. Although these stipulations have allowed the parties to develop a factual record for this Court prior to the Preliminary Injunction hearing, the parties do not waive the right to conduct additional discovery following such hearing and prior to the final trial in this matter. As discovery is ongoing, the parties reserve the right to revise or supplement these statements of fact as necessary. The parties reserve any objection to the relevance and materiality of these stipulated facts.

Old Administrative Regulation #5

1. The City policy regarding use of public buildings was adopted by the City Manager on February 3, 1997. A copy of that policy ("Old Administrative Regulation No. 5") is attached hereto as **Exhibit A**. Old Administrative Regulation No. 5 was in full force and effect until it was replaced on September 9, 2008, by New Administrative Regulation No. 5, attached as **Exhibit B**. The City Manager has provided supplemental direction on the imple-mentation of New Administrative Regulation #5; an electronic mail outlining the supplemental direction is attached hereto as **Exhibit C**. New Administrative Regulation No. 5 and the supplemental directive is the policy currently in effect relative to the use of the interior spaces of City Hall.

2. The use of City Council Chambers and the community room on the third floor of City Hall is subject to the Rules of Council, rather than either Old Administrative Regulation #5 or New

Administrative Regulation #5, specifically Rule 3.1 attached hereto as **Exhibit D**.

3. Pursuant to the City Facility Management's practice under Old Administrative Regulation #5, persons who were authorized to "sponsor" uses of the inside of Cincinnati City Hall were the Mayor, a member of the Cincinnati City Council, the City Manager and his assistants, or City Department Directors or Division Heads.

4. As applied by the Clerk of Council, individuals authorized to reserve the use of Council Chambers and the community rooms (also referred to as Committee Room A and Committee Room B) on the third floor of City Hall, used for City Council committee meetings, are members of Council, the Mayor, the City Manager and his assistants and City Department Directors.

5. Under Old Administrative Regulation No. 5, City Hall rooms 115 and 169 are regularly used for meetings, press conference and other purposes allowed under Old Administrative Regulation No. 5. The basement lunchroom has been used for monthly Bike/PAC meetings and the lobby and interior front steps have been used for charity kickoffs/solicitations, for the display of art work and the Christmas tree, and for the Issue 10 Rally and Press Conference.

6. The calendar maintained by the City from February 3, 1997 to present (note for some of such spaces all of the years in question were not available) for the uses of City Hall Conference

Room 115 is attached hereto as **Exhibit E-1.** The calendar maintained by the City from March 2002 to present for the uses of City Hall Conference Room 169 is attached hereto as **Exhibit E-2.** The combined calendar maintained by the City from January 2006 to present for the uses of City Hall's City Council Chambers and the community room on the third floor of City Hall is attached hereto as **Exhibit E-3.** The City represents that there is no calendar or log book relating to the use of the front lobby and interior first floor staircase (Plum Street side) (the "Lobby and Steps").

7. From February 3, 1997, to the present, various private individuals and organizations participated in certain uses occurring in City Hall arranged or requested by City Officials/ employees including some uses indicated by the calendars and the following:[1]

Lobby and first floor staircase (Plum Street side)

a) February 27, 2008, rally and press conference promoting the passage of Issue 10, including representatives of Parents for Public Schools of Greater Cincinnati, the AMOS Project and the Baptist Ministers Conference of Cincinnati and Vicinity. Requested by

---

[1] The Parties agree that the Court may rely upon the exhibits attached hereto for additional information on the uses or groups described in Paragraph 7.

Councilmember John Cranley's office. **Exhibits F-1, F-2 and F-3** are email communications regarding the rally and press conference and **Exhibit F-4** is a press release from CASE describing the rally and press conference.

b) Occasional annual rallies for charitable City sponsored giving campaigns (specifically, the United Way, United Negro College Fund, Community Shares and Fine Arts Fund).

c) Tables for United Way and Fine Arts Fund solicitations during the respective City charitable giving campaigns.

d) In 2000, display of the piece of art entitled "The Memorial of Our Lost Children", comprised of shoes, toys and other items that belonged to murdered children.

e) In December of each year, a Christmas tree display and other holiday decorations.

f) Jan Leslie of CASE maintains that sometime between the years 2000 and 2004 there was one other rally and press conference involving the Cincinnati Public Schools tax levy,

arranged by one of the council members or the mayor.

Basement Lunchroom

g) Regular monthly meetings of the City's Department of Transportation and Engineering's Bike/Pedestrian Advisory Committee, which is staffed by City employees, from 2004 to 2007.

h) May 9, 2006 - American Bicyclists held a Bicycle Commuter Course presentation as part of the above referenced Bike/Pedestrian Advisory Committee meeting.

Room 115

i) March 3 & 10, 1997 – During the City's Fine Arts Fund campaign, the Administration held a prize drawing for employee contributors to the Fine Arts Fund.

j) November 12, 1997 – Keep Cincinnati Beautiful, a City contractor, held a meeting. A copy of the current contract is attached hereto as **Exhibit X**.

k) March 5, 1998 – SEEPAC, requested by Cincinnati Police Department employee Laura Williams.

l) November 12, 1998 – American Society for Public Administrators, board meeting and luncheon.

m) April 21, 1999 – Keep Cincinnati Beautiful, a City contractor, held a meeting.

n) July 20, 1999 – Persons interested in bringing a professional women's soccer team held a press conference with Councilmember Todd Portune. Attached **Exhibit G** provides further detail.

o) September 13, 1999 – Soccer Committee, requested by Karen Ball of Councilmember Todd Portune's office.

p) October 25, 1999 –International Visitors Council, requested by City Manager's Office employee Gina Ruffin. Further information on the International Visitor's Council of Greater Cincinnati is provided in attached **Exhibit H**.

q) November 12, 1999 – ICMA (International City/County Management Association) had its annual convention in Cincinnati in 2000; local co-chair John Shirey (City Manager) held a meeting to plan for fundraising associated with the committee's responsibilities.

r) February 14, 2000– Fundraiser, Water Works employee Pat Herold (now deceased).

s) September 18, 2000 – Room held all day for ICMA meeting per City Manager.

t) October 6, 2000 – United Way meeting requested by Shirley Dunham of Councilmember Crowley's office.

u) October 26, 2000 – United Way meeting requested by Shirley Dunham of Councilmember Crowley's office.

v) March 23, 2001 – City's United Negro College Fund Drive – "A Taste of City Hall" fundraiser.

w) April 15, 2002 – Press Conference/ Senator Mallory, requested by Department of Community Development employee Velda Boyd. A press release providing further information is attached hereto as **Exhibit I**.

x) September 3, 2003 –United Way meeting requested by the City's Public Information Officer Meg Olberding.

y) September 25, 2003 – Hamilton County Convention Facilities

Authority meeting, attended by City Officials.

z) December 18, 2003 – meeting of EITC Partnership/ Make Work Pay, requested by Councilmember Pepper. Copies of articles and web pages explaining the group are attached hereto as **Exhibits J-1 and J-2.**

aa) December 19, 2003 – meeting of EITC Partnership/ Make Work Pay, requested by Councilmember Pepper.

bb) May 25, 04 – Office of National Drug Policy press conference.

cc) February 3, 2005 – City's Fine Arts Fund Campaign kickoff.

dd) June 21, 2006 – Kids Voting seminar on local government, requested by Councilmember Monzel. Further information attached hereto as **Exhibit K**.

ee) February 13, 2008 – Mayor's annual Youth in City Government program

ff) February 29, 2008 – American Idol celebrity Randy Jackson gave a speech about heart health, requested by Councilmember Berding.

gg) August 23, 2008 – Ohio Department of Corrections Director Terry Collins

spoke about the campaign "Who killed our kids?", requested by Mayor Mallory. Further information is attached as **Exhibit L**.

Room 169

hh) November 19, 2002 – Keep Cincinnati Beautiful, a City contractor, held a meeting.

ii) February 27, 2003 – Hamilton County Convention Facilities Authority orientation meeting, attended by City officials.

jj) September 14, 2006 – Earned Income Tax Credit meeting, requested by Carla Walker of the Mayor's office.

Council Chambers and Committee Room

kk) January 11, 2007 – Cincinnati Teen Court, mock trial program, requested by Councilmember Cole.

ll) August 14, 2007 – Youth Recognition Ceremony, requested by Councilmember Thomas.

mm) September 28, 2007 – United Way campaign requested by Water Works.

nn) December 12, 2007 – Green & Healthy Schools meeting, addressing issues related to building environ-

mentally friendly schools and the environmental and health issues impacting areas in which schools are located. Requested by Councilmember Qualls.

oo) March 12, 2008 – Truman Scholarship interviews, requested by Councilmember Cranley. Further information attached hereto as **Exhibits M-1 and M-2**.

pp) April 24 & 25, 2008 – Mayor's Concert Series, performed by Linton Chamber Music.

qq) 8 & 9 May 08 – Mayor's Concert Series, performed by Linton Chamber Music.

rr) 8 Sep 08 – City's United Way Campaign, requested by Councilmember Berding.

ss) 17 Oct 08 – SORTA, requested by Councilmember Bortz.

tt) For each of the past three years, the Greater Cincinnati Chamber of Commerce, Leadership Cincinnati program has held either part or all of its Government Day session in either Cincinnati City Council Chambers or the community room – these events were arranged by the City Manager's Office.

8. Each of the following independent organizations are not City departments, divisions, or contractors: the AMOS Project, the Baptist Ministers Conference of Cincinnati and Vicinity, the International Visitors Council, American Society for Public Administrators, the ICMA (International City/County Management Association), United Way, United Negro College Fund, the Fine Arts Fund, Kids Voting, Delta Sigma Theta Sorority (for a description of this organization, see attached **Exhibit Y**), the Linton Chamber Music Series and Harry S. Truman Scholarship Foundation. Keep Cincinnati Beautiful is an organization independent from the City of Cincinnati and is not a City department or division, but it is a City contractor pursuant to an Agreement with the City of Cincinnati and performs services for the City pursuant thereto.

9. The Cincinnati Public Schools, the University of Cincinnati, the Office of National Drug Policy, PUCO (the Public Utilities Commission of Ohio), SORTA (Southwest Ohio Regional Transit Authority) and Teen Court (a project of Hamilton County) are governmental entities separate and distinct from the City of Cincinnati. The Hamilton County Convention Facilities Authority is a public body organized and existing pursuant to Chapter 351 of the Ohio Revised Code.

10. In 2002, Senator William Mallory was not an official of the City of Cincinnati.

New Administrative Regulation #5

11. Under New Administrative Regulation #5, the word "assemblages" as used in the third paragraph, may include rallies and press conferences at which expressive activities may take place.

12. Under New Administration Regulation #5, the only assemblages that may take place inside of Cincinnati City Hall (with the exception of meetings of public bodies of the City) are those held pursuant to the first sentence of the third paragraph of New Administrative Regulation #5.

13. Pursuant to the City Facility Management's practice under New Administrative Regulation #5, persons/entities authorized to "use interior spaces of City Hall for assemblages," are the Mayor, City Council members, the City Manager and his assistants, City Department Directors and City Commissions and Boards.

Stipulations applicable to both Old Administrative Regulation #5 and New Administrative Regulation #5

14. Pursuant to both the City Facility Management's practice under Old Administrative Regulation #5 and New Administrative Regulation #5, the person who sponsored the use (under Old Administration Regulation #5) and the "use[r] [of] interior spaces of City Hall for assemblages" (under New Administrative Regulation #5) did not nece-

ssarily need to attend the use and/or participate in the use in order for it to proceed.

15. Pursuant to both the City Facility Management's practice under Old Administrative Regulation #5 and New Administrative Regulation #5, private individuals could appear, speak, hold signs or engage in other communicative activities at allowable uses inside City Hall as long as such communication is consistent with the message conveyed at such use.

16. Pursuant to both the City Facility Management's practice under Old Administrative Regulation #5 and New Administrative Regulation #5, any of the individuals authorized to "sponsor" uses (as set forth in Stipulation #2, above) or "use the areas inside of Cincinnati City Hall for assemblages" (as set forth in Stipulation #12, above) could allow the use of such areas for an event or assemblage in support of or in opposition to issues appearing on the ballot at a forthcoming election.

17. Pursuant to all of (i) the City Facility Management's practice under Old Administrative Regulation #5, (ii) the Rules of Council and (iii) New Administrative Regulation #5, the person who could sponsor a use inside of City Hall (as set forth in Stipulation #3, above), the persons authorized to reserve Council Chambers and the third floor community room (as set forth in Stipulation # 4, above), and persons who could "use interior spaces of City Hall for assemblages" (as set forth in

Stipulation # 14, above), were or are able to use his or her full and independent discretion (except as provided below) in determining whether to sponsor such use or use such space for an assemblage, including sponsoring a use of such space for an assemblage at which private individuals or groups could appear, speak, hold signs or engage in other communicative activities.

The parties DO NOT agree on the following alternate additional language. It is included for purposes of showing their area of disagreement.

A. With respect to the foregoing, the City maintains that the exercise of such discretion was and is constrained, (i) as to Old Administrative Regulation #5, as stated in Mr. Koopman's letter dated April 29, 2008, that Cincinnati City Hall (as one of many City Facilities) was to be used "for conducting business related to the functions of [the City's] various departments in serving the citizens and by City Council in the performance of their duties" and (ii) as to New Administrative Regulation #5, is to be used only for "allowing City officials to exercise the rights and responsibilities specified in the Charter of the City of Cincinnati."

B. With respect to the foregoing, Plaintiffs maintain that there was and is no

constraint on the exercise of such discretion per the language of Old Administrative Regulation #5, as well as in actual practice.

18. Under the City Facility Management's practice under Old Administrative Regulation #5 and under New Administrative Regulation #5, in order for private individuals to participate in a rally and press conference inside of City Hall, such individuals would need to politically or administratively collaborate with the Mayor, a member of the Cincinnati City Council, the City Manager and his assistants, a City Department Director, or a City Board or Commission. The City's policy allows full and independent discretion to each of the aforementioned individuals in determining whether or not to politically or administratively collaborate with private individuals. Because of the requirement for political or administrative collaboration with City officials, it was and remains possible that private advocates of one position, *e.g.*, the "Yes" position, on a ballot issue, could participate in a rally or press conference inside City Hall, and advocates of the opposite viewpoint, *e.g.*, the "No" position on the same ballot issue, could not participate in a similar rally or press conference inside City Hall unless those advocating such opposite viewpoint could also politically or administratively collaborate with one of the aforementioned individuals.

General Statements

19. In the City of Cincinnati, there is 1 Mayor, 9 members of Council, 31 Directors of City Departments and 89 Division Heads within the City's Departments.

20. City Hall is not accessible by private individuals from 5:30 p.m. through 8:00 a.m. every weekday and all day Saturday and Sunday, except for invitees of City employees with special access passes and for specified after-hours events. The main entrance to City Hall is adjacent to the interior lobby and all other entrances to City Hall are closed.

21. The grounds outside City Hall are generally available to the public for certain expressive activity 24 hours/day, seven days/week.

22. There is no difference in the procedure to be followed under Old Administrative Regulation #5 and New Administrative Regulation #5 for an independent person or organization to try to achieve political or administrative collaboration with a City official for purposes of conducting an assemblage inside City Hall.

23. The articles attached hereto as **Exhibits N-1** and **N-2** are true and accurate recitals of the rally and press conference that occurred on the Lobby and Steps on Wednesday, February 27, 2008 and the accompanying photo accurately depicts the rally and press conference.

24. To the extent that it depicts the rally inside City Hall, the WCPO news story, a DVD of which is attached hereto as **Exhibit O**, accurately depicts the rally of that day on the first floor Lobby and Steps on Wednesday, February 27, 2008.

25. Christopher P. Finney, attorney for Plaintiffs, wrote to City Manager Milton Dohoney on April 28, 2008, asking to "have a press conference and rally" in "exactly the same location as" used for the Issue 10 Rally and Press Conference on May 5, 2008. A copy of that letter is attached as **Exhibit P**.

26. Joel Koopman, City Facilities Manager, wrote back to Mr. Finney on April 29, 2008. A copy of his response letter is attached as **Exhibit Q**.

27. Mark Miller wrote again to Mr. Koopman requesting use of the same spaces, this time for an August 20, 2008 rally and press conference. A copy of his letter is attached as **Exhibit R**.

28. Mr. Koopman responded to Mr. Miller's letter on August 1, 2008. A copy of his response letter is attached as **Exhibit S**.

29. If Plaintiffs had asked for use of other spaces in City Hall (e.g., conference rooms 115 and 169 and the basement lunchroom) in the same manner as set forth in Exhibits P and R, the response would have been the same as set forth in Exhibits Q and S.

30. If Plaintiffs had asked for use of City Council Chambers and/or the third floor community room in the same manner as set forth in Exhibits P and R, the Clerk of Council's response would have been substantially the same as set forth in Exhibits Q and S.

31. Plaintiffs' two requests to use an interior space at City Hall were functionally equivalent in form and substance to the Issue 10 Rally and Press Conference organizers' request and the CCV Press Conference organizers' request except that (a) Plaintiffs asked in writing, (b) Plaintiffs asked City Manager Dohoney directly (a designated City official authorized to arrange for such use) and the Issue 10 Rally and Press Conference and the CCV Press Conference organizers directed their requests to the offices of Council members, (c) for the Issue 10 Rally and Press Conference and the CCV Press Conference, the relevant Council members' aides arranged for the use of space within City Hall with Facilities Management, as described in attached Exhibit U, (d) organizers of the Issue 10 Rally and Press Conference and the CCV Press Conference administratively or politically collaborated with the offices of the relevant City officials.

32. The only reason that Facilities Management did not approve the Plaintiffs' use of the interior space of City Hall because they lacked a political or administrative collaboration with one of the designated City officials authorized to arrange for such use.

33. Instead of conducting their rallies/press conferences in the interior spaces of City Hall, Plaintiffs conducted their rallies/press conferences on the exterior front steps leading into City Hall in May and August 2008. Attached hereto as **Exhibit Z** are photographs of both rallies/press conferences.

34. Photos of (i) the Lobby and Steps, (ii) basement lunch room of City Hall as of October 16, 2008, (iii) City Hall Conference Room 115, (iv) City Hall Conference Room 169, (v) Council Chamber of City Hall, and Council Community Room, all as of as of October 16, 2008, are attached as **Exhibit T**. These photos fairly and accurately portray the relevant areas of City Hall as of October 16, 2008 and are substantially similar to the relevant areas as they existed during the uses set forth in Paragraph 7 of these stipulations.

35. As it relates to reserving space in the interior of City Hall, Facilities Management and the Clerk of Council confirmed that when a City official/employee requested use of City Hall space, Facilities Management and the Clerk of Council reserved the space with a brief description of the purpose of the event, assuming that the uses were for a proper purpose but without analysis of whether the City official or employee was actually "conducting business relating to the functions of our various departments in serving the citizens and by City Council in the performance of their duties[,]" or "exercising the rights and responsibilities specified in the Charter of the

City of Cincinnati[,]" or engaged in "the public business of the City" or "other public business."

Issue 10 Rally

36. On February 27, 2008, a rally and press conference was held inside of Cincinnati City Hall in support of Issue 10 (the "Issue 10 Rally and Press Conference"), which was a school levy appearing on the ballot in the forthcoming election.

37. Representatives of the Issue 10 campaign worked with Council members Cranley and Crowley in support of Issue 10. A representative of the Issue 10 campaign contacted Councilmember John Cranley's office to use the Lobby and Steps for the Issue 10 Rally and Press Conference.

38. In Jan Leslie's oral communication with Councilmember John Cranley's aide, Gina Marsh, to arrange the Issue 10 Rally and Press Conference, Leslie asked Marsh: "can you set this up?" The words "sponsor" and "sponsorship" were never discussed. Based on this oral communication, Marsh requested City Facilities Management to arrange for use of the space.

39. Gina Marsh contacted Facilities Management and made the arrangements for use of City Hall. An e-mail communication from Gina Marsh of John Cranley's Council office to Joel Koopman, City Facilities Manager, and his response and further communications are attached hereto as **Exhibit U**.

40. On February 27, 2008, a resolution in support of Issue 10 was on the City Council Agenda and was supported by a number of City Council members including Council members Cranley and Crowley. That resolution was "filed" without being voted upon by the Council.

41. With respect to the Issue 10 Rally and Press Conference, the City of Cincinnati provided the podium and microphone used for that rally.

42. Following the Issue 10 Rally and Press Conference, no one made any oral or written complaints that the Issue 10 Rally created any violation of fire or other safety codes.

43. At the time that the Issue 10 Rally and Press Conference occurred, it was part of the City's standard operating practice for a security guard to be posted at the entrance into Cincinnati City Hall and for visitors to City Hall to sign in with the guard. The security log book entries for that date are attached hereto as **Exhibit V**.

44. Since the Issue 10 Rally and Press Conference, security procedures at City Hall were changed to require that security personal stationed at the entrance to Cincinnati City Hall possess a firearm. **Exhibit AA**, attached hereto, further describes City Hall security procedures.

45. The City maintains that the Issue 10 Rally and Press Conference was consistent with its policies in effect at that time as to the use of the interior spaces of City Hall.

CCV Press Conference

46. On June 9, 2008, a press conference was held inside the Cincinnati City Hall at which Citizens for Community Values ("CCV") called upon *CityBeat* to stop accepting adult advertisements (the "CCV Press Conference").

47. Councilmember Monzel's aide, Brad Beckett, contacted the City Manager's office and made arrangements for the use of Conference Room 115 of City Hall for that press conference. The City Manager's office then contacted the City Facilities Manager to complete the arrangements for use of Conference Room 115 of City Hall for the CCV Press Conference.

48. Concurrent with the CCV Press Conference, a letter to John Fox, Editor and copublisher of *CityBeat* was distributed. The letter had at its bottom the names of 39 individuals, including Councilmember Chris Monzel. A copy of that letter is attached hereto as **Exhibit W.**

49. In David Miller's oral communication to Brad Beckett to arrange for the CCV Press Conference, Miller requested only "to use" a conference room. The words "sponsor" and "sponsorship" were never discussed. Based on this oral communication, Beckett requested City Facilities Management to arrange for use of the space.

50. Councilmember Monzel was not present at the CCV Press Conference.

51. No City official or employee spoke at the CCV Press Conference.

52. Aides for Council members Monzel and Cole were in attendance and observed the CCV Press Conference from the back of the room.

53. With respect to the CCV Press Conference, the City of Cincinnati provided the podium and microphone used for that rally.

54. The CCV Press Conference did not create any security problems at Cincinnati City Hall.

55. The CCV Press Conference did not unreasonably interfere with any official business occurring elsewhere inside of Cincinnati City Hall.

56. Items related to the issues relevant to the CCV press conference were not then and are not now on the City Council agenda.

Additional Stipulations Relating to Allegations in Complaint

57. Plaintiff Mark Miller is a citizen and taxpayer of the State of Ohio and is a member, supporter and duly authorized agent of COAST. Miller regularly engages in a variety of expressive activities and expects and intends in the future to continue his community involvement and concomitant expressive activity.

58. Plaintiff Coalition Opposed to Additional Spending & Taxes ("COAST") is a continuing

unincorporated association of individuals organized as a political action committee under the laws of the State of Ohio devoted to advocacy on a variety issues limiting the power and intrusiveness of government year after year. COAST has been in continuous existence since 1999. COAST advocates publicly in favor of its view of sound fiscal policy, and frequently engages in ballot issue efforts and campaigns. It also advocates on legislative and legal issues from time to time. At all relevant times hereto, COAST has been involved in and supportive of an initiative effort restricting the ability and authority of the Council of the City of Cincinnati to implement an automated photo-monitoring program to enforce claimed violations of City traffic laws.

59. In addition to bringing this action individually and on behalf of all others similarly situated, COAST brings this action on behalf of its supporters.[2]

60. During the summer of 2008, COAST also joined a drive to place a second initiative on the November ballot: the use of a system of proportional representation to elect the Cincinnati City Council. Furthermore, COAST intends to engage in the same or similar advocacy in the future regarding taxing and spending issues by the City of Cincinnati, and, in such advocacy, now and in the future, to avail

---

[2] References to COAST include both the organization as an entity and its individual supporters and members.

itself of the fora that the City has made available to City officials and private individuals or groups who politically or administratively collaborate. Through the course of its advocacy, historically and prospectively, COAST has engaged and intends to continue to engage in a variety of expressive activities, including petition drives, press conferences, press releases, public statements and demonstrations.

61. Plaintiff WeDemandAVote.Com is an unincorporated association or coalition of individuals and organizations. WeDemand AVote.Com is involved in numerous local issues and in the course of this involvement, regularly engages in a variety of expressive activities, including petition drives, press conferences, press releases, public statements and demonstrations. At all relevant times hereto, COAST has been a part of WeDemand AVote.Com and supporter of the efforts of WeDemandAVote Com relative to stopping the implementation of an automated photo-monitoring program to enforce claimed violations of City traffic laws and implementing proportional representation for the election of the Cincinnati City Council. WeDemand AVote.Com expects and intends to continue its community involvement and concomitant expressive activity and desires, in such efforts, to avail itself of the interior of City Hall. Through the course of its activities, WeDemand AVote.Com regularly engages in a variety of expressive activities, including petition drives,

press conferences, press releases, public statements and demonstrations.

62. On August 6, 2008, by a vote of 4 – 4, Cincinnati City Council defeated an ordinance submitted by the City Manager's Office that selected a vendor for the "red light camera" project. The ordinance was drafted and submitted as a result of Council's inclusion of projected red light camera revenues in the 2008 City budget, and followed an RFP process in which a particular vendor was selected.

63. Defendant City of Cincinnati is a municipal corporation, capable of being sued and organized and existing under the Ohio Revised Code. Defendant City of Cincinnati adopted and implemented some or all of the policies, practices or customs at issue in this case. Milton R. Dohoney, Jr., is the City Manager for the City of Cincinnati and, as such, is responsible for the day-to-day operations of the City of Cincinnati.

64. Joel Koopman is the Facilities Manager for the City of Cincinnati. Attached exhibits describe his responsibilities as they relate to the use of the interior of City Hall.

65. All actions by the Defendants at issue in this case were undertaken under color of state law.

66. Defendants Dohoney and Koopman are sued only in their official capacities and have no personal liability in this matter.

67. Cincinnati City Hall is located at 801 Plum Street, in Hamilton County, Ohio.

68. In late 2007 or early 2008, the Cincinnati Public School Board voted to place on the ballot at the primary election of March 4, 2008, an emergency operating levy for the Cincinnati Public Schools. This issue appeared on the March 4, 2008 ballot as Issue 10.

69. Participants and speakers at the Rally and Press Conference in the Lobby and Steps included representatives from various private organizations, including Parents for Public Schools of Greater Cincinnati, Cincinnatians Active to Support Education ("CASE"), the AMOS Project and the Baptist Ministers Conference of Cincinnati and Vicinity.

70. At the School Levy Rally, one of the speakers was Pamela Green of the private organization Parents for Public Schools of Greater Cincinnati. During her political speech, Ms. Green led the individuals who had assembled on the Lobby and Steps inside of Cincinnati City Hall in chanting the slogan "Yes on 10, for our children".

71. In addition to Ms. Green, other speakers at the Rally and Press Conference included Jan Leslie of CASE, Mark G. Turner of CASE, Rosa Blackwell who was the Superintendent of Cincinnati Public Schools, Rev. Richard Bollman of the AMOS Project, and Rev. James Pankey who was the president of the Baptist Ministers Conference.

72. For several months (including at the time that they made their initial request to use the Lobby and Steps of Cincinnati City Hall for a rally and press conference, see paragraph 25, *supra*), Plaintiffs had been engaged in an initiative petition effort seeking to amend the Charter of the City of Cincinnati to prohibit the implementation of an automated photo-monitoring program to enforce claimed violations of City traffic laws. Such an amendment would preclude the council of the City of Cincinnati from enacting legislation currently being considered that would provide for the placement of unmanned red light cameras and speeding cameras throughout the geographic boundaries of the City of Cincinnati. Plaintiffs also participated over the summer of 2008 in a second petition drive to place a Charter Amendment on the ballot to change the way City Council was election to a "proportional representation" electoral method.

73. Plaintiffs sought to conduct their press conference and rally on Wednesday, August 20, 2008 at 2:00 PM. This event was intended to announce and celebrate the turn-in of more than 14,000 signatures collected for the proposed red light camera amendment to the City Charter and more than 15,000 signatures for the proportional representation amendment to the City Charter. City Council placed the two proposed Charter Amendments discussed herein before the voters. The Ohio Constitution at Article XVIII, Sections 8 and 9, dictates that these petitions must be submitted, reviewed and voted on by the City Council at least sixty

(60) days before the November 4, 2008 election day. If there was a late submittal and a concomitant delay, the November 4, 2008 election would have been missed, and a subsequent and costly special election would be constitutionally mandated.

74. Article XIII, Section III of the City Charter provides:

Section 3. Public Financing of Campaigns

Notwithstanding anything in this Charter to the contrary, no monies of the City of Cincinnati or any of its Boards or Commissions, from any source whatsoever, or funds of any other entity disbursed by the City or any of its Boards or Commissions, may be disbursed to any candidate for any public office, campaign committee of any candidate for any public office, political action committee, or political party, or may be expended for the purpose of advocating the election or defeat of any candidate for any public office, or for the passage or defeat of any ballot issue.

75. Plaintiffs desire to use the interior of City Hall for communicative activities without the necessity of associating with a City-connected sponsor or user or otherwise "politically or administratively collaborating" with someone authorized by the City to arrange for such use for communicative activities.

76. Plaintiffs, either individually or collectively, seek to conduct within Cincinnati City Hall

further press conferences and rallies on the initiative on prohibiting red-light-camera enforcement of the traffic laws, as well as an initiative on proportional representation for city council elections. Such press conferences and rallies would be conducted up to the forthcoming election on November 4, 2008.

77. Each of the Plaintiffs has an historical and continuing involvement and interest in civic affairs, including in matters extending beyond the 2008 elections. As a result, Plaintiffs, either individually or collectively, also intend, in the future, *i.e.*, beyond the November 4, 2008 election day, to be engaged in public initiative and public advocacy relating to the City of Cincinnati, above and beyond the current initiative effort, and during the course of which to hold press conferences and rallies within Cincinnati City Hall.

78. As described in these stipulations, the City Manager's adoption of Old and New Administrative Regulation No. 5, his delegation of authority to Facilities Management to manage the uses of interior spaces within City Hall, the decisions and implementing actions of Facilities Management pursuant to that delegation of authority, and City Council's adoption of Rule 3.1 of the Rules of Council, constitute official policies and practices of the City of Cincinnati. The action of any individual councilmember does not in and of itself constitute an official policy, custom practice or usage of the City of Cincinnati.

Respectfully submitted,

/s/ Curt C. Hartman
Christopher P. Finney (0038998)
FINNEY, STAGNARO, SABA & PATTERSON CO., LPA
2623 Erie Avenue Cincinnati, Ohio 45208
Telephone: (513) 533-2980
Facsimile: (513) 533-2990
Email: *cfinney@fssp-law.com*

Curt C. Hartman (0064242)
THE LAW FIRM OF CURT C. HARTMAN
3749 Fox Point Court Amelia, Ohio 45102
Telephone: (513) 752-8800
Facsimile: (513) 752-6621
Email: *hartmanlawfirm@fuse.net*

Attorneys for Plaintiffs

JOHN P. CURP (0064782) City Solicitor
s/ Richard Ganulin
RICHARD GANULIN (0025642)
PAULA BOGGS MUETHING (0080018)
Assistant City Solicitors
Counsel for Defendants
Room 214, City Hall
801 Plum Street Cincinnati, Ohio 45202
Telephone: (513) 352-3329
Fax: (513) 352-1515
richard.*ganulin@cincinnati-oh.gov*

Attorneys for Defendants

184 (2)

No. 10-1054

In the
Supreme Court of the United States

CITY OF CINCINNATI, MILTON R. DOHONEY, JR., AND JOEL KOOPMAN,
Petitioners,

v.

MARK MILLER, COALITION OPPOSED TO ADDITIONAL SPENDING & TAXES, AND WEDEMANDAVOTE.COM,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Curt C. Hartman
THE LAW FIRM OF CURT C. HARTMAN
3749 Fox Point Court
Amelia, Ohio 45102
Telephone: (513) 752-8800
hartmanlawfirm@fuse.net

Christopher P. Finney
Counsel of Record
FINNEY, STAGNARO, SABA & PATTERSON CO., LPA
2623 Erie Avenue
Cincinnati, Ohio 45208
Telephone: (513) 533-2980
cfinney@fssp-law.com

Counsel for Respondents

March 28, 2011

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

I. Whether the Sixth Circuit erred in applying the deferential abuse of discretion standard to the district court's issuance of a preliminary injunction based on the likelihood that respondents will ultimately prevail in this case under this Court's public forum doctrine.

II. Whether, based upon the limited and preliminary record developed solely for consideration of the issuance *vel non* of a preliminary injunction, the Sixth Circuit erred in concluding that the government-speech doctrine was not applicable when Petitioners allowed speeches and political rallies by other private organizations in certain areas of a public building.

III. Whether the Sixth Circuit erred in applying the deferential abuse of discretion standard to the district court's issuance of a preliminary injunction based on the likelihood that respondents will ultimately prevail in this case based upon the void-for-vagueness doctrine.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT OF THE CASE 1

ARGUMENT 15

THE PETITIONERS HAVE NOT ESTABLISHED SUFFICIENTLY COMPELLING REASONS FOR THIS COURT TO REVIEW THE APPLICATION OF THIS COURT'S PUBLIC FORUM DOCTRINE AS IT CONCERNS THE ISSUANCE OF A PRELIMINARY INJUNCTION 16

THE PETITIONERS HAVE NOT ESTABLISHED SUFFICIENTLY COMPELLING REASONS FOR THIS COURT TO FURTHER AND MORE BROADLY EXPAND THE CONCEPT OF GOVERNMENT SPEECH AT THE EXPENSE OF THE PUBLIC FORUM DOCTRINE 22

THE PETITIONERS HAVE NOT ESTABLISHED SUFFICIENTLY COMPELLING REASONS FOR THIS COURT TO REVIEW THE APPLICATION OF THE

VOID-FOR-VAGUENESS DOCTRINE TO THE ISSUANCE OF THE PRELIMINARY INJUNCTION 25

CONCLUSION 29

TABLE OF AUTHORITIES

Page

Cases

ACT-UP v. Walp,
755 F. Supp. 1281 (M.D. Pa. 1991) 3

Air Line Pilot's Ass'n, Inc. v. Dep't of Aviation,
45 F.3d 1144 (7th Cir. 1995) 19

American Civil Liberties Union v. Mote,
423 F.3d 438 (4th Cir. 2005) 19, 20

Arizona Life Coalition Inc. v. Stanton,
515 F.3d 956 (9th Cir. 2008) 24

Ashcroft v. American Civil Liberties Union,
542 U.S. 656 (2004) 21

Atlanta Journal & Constitution v. City of Atlanta Dep't. of Aviation,
322 F.3d 1298 (11th Cir. 2003) 28

Bryant v. Gates,
532 F.3d 888 (D.C. Cir. 2008) 3

Child Evangelism Fellowship of Maryland v. Montgomery County Pub Sch.,
457 F.3d 376 (4th Cir. 2006) 27

Choose Life Illinois, Inc. v. White,
547 F.3d 853 (7th Cir. 2008) 24

Christ's Bride Ministries, Inc. v. SEPTA,
148 F.3d 242 (3d Cir. 1998) 19

Cornelius v. NAACP Legal Defense and Educational Fund, Inc.,
473 U.S. 788 (1985) 16

Del Gallo v. Parent,
557 F.3d 58 (1st Cir. 2009) 18

Doran v. Salem Inn, Inc.,
422 U.S. 922 (1975) 21

Forsyth County v. Nationalist Movement,
505 U.S. 123 (1992) 26

Good News Club v. Milford Central School,
533 U.S. 98 (2001) 16

Grayned v. City of Rockford,
408 U.S. 104 (1972) 26

Griffin v. Secretary of Veterans Affairs,
288 F.3d 1309 (Fed. Cir. 2002) 27, 28

Helms v. Zubaty,
495 F.3d 252 (6th Cir. 2007) 3

Johanns v. Livestock Mktg. Ass'n,
544 U.S. 550 (2005) 22

Lakewood v. Plain Dealer Publ'g Co.,
486 U.S. 750 (1988) 26

Lewis v. Wilson,
253 F.3d 1077 (8th Cir. 2001) 28

Paulsen v. County of Nassau,
925 F.2d 65 (2d Cir. 1991) 18

Pleasant Grove v. Summum,
555 U.S. __, 129 S.Ct. 1125 (2009) . 22, 23, 24, 25

Shuttlesworth v. Birmingham,
394 U.S. 147 (1969) 26

Sons of Confederate Veterans, Inc. v. Commissioner of Virginia Department of Motor Vehicles,
288 F.3d 610 (4th Cir. 2002) 24

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,
455 U.S. 489 (1982) 26

Walters v. National Assn. of Radiation Survivors,
473 U.S. 305 (1985) 21

Warren v. Fairfax County,
196 F.3d 186 (4th Cir. 1999) 20

Constitution

U.S. Const. amend I ..... *passim*

Rules

S.Ct. Rule 10(a) 27

S.Ct. Rule 10(c) 27

S.Ct. Rule 14(h) 26

INTRODUCTION

The Court should deny the petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit sought by Petitioners City of Cincinnati, Milton R. Dohoney, Jr., and Joel Koopman. There is no conflict amongst the circuit courts or any conflict with this Court's precedent. Furthermore, there was also no error below, as the District Court applied the correct law with respect to issuing the preliminary injunction and the Sixth Circuit appropriately concluded the issuance did not constitute an abuse of discretion. This case has proceeded only so far as the issuance of a preliminary injunction and, thus, resolution of all the factual and legal issues is not final. All that has been resolved has been the Respondents' likelihood of success and the appropriateness *vel non* of the issuance of preliminary relief.

STATEMENT OF THE CASE

Since at least 1997, various private individuals and organizations have participated in speech-related events and activities within certain specific areas within Cincinnati City Hall. Up until September 9, 2008, the participation of these private individuals and organizations in such events or activities was purportedly pursuant to the then-existing Administrative Regulation #5 (referred herein as "Old Administrative Regulation #5"). Old Administrative Regulation #5 formally set forth Cincinnati's longstanding policies regarding the use of the City's public buildings, including Cincinnati City Hall.

Adopted and promulgated by the Cincinnati City Manager in February 1997, Old Administrative Regulation #5 provided, in part, that:

> No private business enterprises or solicitations should be permitted in City buildings or operated therefrom. Exceptions should be made only by specific approval of the Department Head when it is judged to be in the public interest, as in the case, for example, of the United Way Campaign.
>
> No private signs or advertising materials should be displayed on or in City buildings unless for an approved public purpose authorized by the Department Head.
>
> . . .
>
> In making any exceptions to the above policies, Department Heads are urged to consider not only what is proper, but also how it appears to the public.

Since the adoption of Old Administrative Regulation #5, numerous meetings, conferences, rallies and other uses involving private individuals and organizations have occurred in certain specific areas within City Hall. These spaces, *i.e.*, the spaces inside of City Hall which are at issue in this case, are: (i) the lobby and first floor staircase; (ii) conference room 115; and (iii) council chambers and related committee meeting rooms.[1] In its opinion granting the Plaintiffs'

---

[1] Notwithstanding the limited nature of the areas at issue in this case, the City conveniently fails throughout the Petition to recognize or acknowledge the specific areas at issue in this case, *i.e.*, those fora that the City has made available to private individuals or groups exercising their political free speech rights

motion for a preliminary injunction, the District Court recognized and extensively summarized some of the many uses to which the spaces at issue in this case had been used.[2]

Without belaboring or repeating the numerous and various uses cataloged by the District Court in issuing the preliminary injunction, the District Court, in assessing the type of forum at issue in this case "closely examine[d]" the past practice of the City with respect to these spaces.[3] In so doing, the District Court "note[d] that a variety of events have been held [in these areas of City Hall] by independent individuals and organizations who are not City officials. These events were open to the public, and

---

inside City Hall. Instead, in no fewer than 19 times in the Petition, the City uses the term "workplace" in an apparent effort to mislead this Court to believe that the Plaintiffs lawsuit is about providing access to every nook and cranny of City Hall, *e.g.*, the private offices of individual council members. Despite the City's effort to create such a misleading impression, that is not what this case is about. For it is important to appreciate that parts of a government building or property may be categorized as one type of forum while other parts of the same building or property may be a different type of forum. *See Bryant v. Gates*, 532 F.3d 888 (D.C. Cir. 2008)(in challenge to denial of advertising within Defense Department newspaper, advertising section was the proper forum for consideration and not the entire newspaper); *Helms v. Zubaty*, 495 F.3d 252, 256 (6th Cir. 2007)("the Judge Executive's office, and not the building in general, is the relevant forum"); *ACT-UP v. Walp*, 755 F. Supp. 1281, 1287 (M.D. Pa. 1991) (making a distinction between the gallery of the House chamber versus the rotunda).

[2] Petition, App. B, at 38a – 40a.

[3] Petition, App. B, at 55a.

were only related to the exercise of the rights and responsibilities of the City officials in the most general sense. . . . *It is clear that City officials use the interior of City Hall however and whenever they desire, without regard to any limitations.*"[4]

As developed below, two of the most pronounced examples of the way that spaces inside of Cincinnati City Hall were utilized without any limitations involved (i) a press conference and rally in support of a school levy which was held in the interior front lobby and steps within the City Hall, and (ii) the use of a conference room for a press conference by a private organization at which no City official designated as having approved the event either spoke at or even attended the event.[5]

In late 2007 or early 2008, the Cincinnati Public School Board[6] voted to place on the ballot at the primary election of March 4, 2008, an emergency operating levy for the Cincinnati Public Schools.[7] This issue was to appear on the ballot as Issue 10.[8] The School Levy Rally came about when representatives of

---

[4] Petition, App. B, at 55a – 56a (emphasis added).

[5] It is noteworthy that these two events occurred during the same time frame that Plaintiffs sought access to the inside of City Hall for its press conference and rally which gave rise to this lawsuit.

[6] Under Ohio law, the board of education is a public body entirely independent from the Cincinnati City Council and is not an agency of the City

[7] Petition, App. D ¶68, at 97a.

[8] Petition, App. D ¶68, at 97a.

the Issue 10 campaign contacted an aide in the office of a councilmember about using the front lobby and interior first floor staircase of City Hall for the School Levy Rally.[9] Specially, Jan Leslie of the private group Cincinnatians Active to Support Education ("CASE") talked with an aide to a councilmember about arranging the School Levy Rally by simply inquiring whether the aide could "set this up?"[10] At no time did Ms. Leslie specifically seek the "sponsorship" of the Rally by the councilmember.[11] In fact, in arranging the School Levy Rally, the council member's aide simply described the event as follows: "the [pro-Issue 10] levy campaign would like to hold a press conference . . . on the first floor of City Hall, using the inside foyer and steps."[12] The City allowed the proponents of the school levy to hold the School Levy Rally in the front lobby and on the interior first floor

---

[9] Petition, App. D ¶37, at 90a.

[10] Petition, App. D ¶¶37 & 69, at 90a & 97a.

[11] Petition, App. D ¶38, at 90a.

[12] Petition, App. D ¶39 & Exh. U, at 90a. In advance of the School Levy Rally, Ms. Leslie of CASE circulated an e-mail calling upon people to "Join supporters on the steps of City Hall (inside) to announce your group, organization and individual support for Issue 10." (Petition, App. D Exh. F-1.) And in a post-event press release which was not issued by the City, but, rather, by the private group CASE, the clear communicative nature that the venue of such a press conference has: "Standing on the steps inside City Hall, dozens of supporters urged school district voters to support the passage of Issue 10 . . . ." (Petition, App. D ¶7a & Exh. F-4, at 73a.)

staircase of City Hall, with the City even providing the podium and microphone used for the Rally.[13]

At the School Levy Rally, one of the speakers was Pamela Green of the private organization Parents for Public Schools of Greater Cincinnati. During her political speech, Ms. Green led the individuals who had assembled on the interior first floor staircase of City Hall in chanting the slogan "Yes on 10, for our children".[14] In addition to Ms. Green, other speakers at the Rally and Press Conference included Ms. Leslie of CASE, Mark G. Turner of CASE, Rosa Blackwell who was the Superintendent of Cincinnati Public Schools, Rev. Richard Bollman of the AMOS Project, and Rev. James Pankey who was the president of the Baptist Ministers Conference.[15]

In light of the City's on-going policy of opening certain areas inside of City Hall for advocacy by private groups or individuals on ballot issues or otherwise, Plaintiffs sought to have access comparable to that provided to other private individuals and

---

[13] Petition, App. D ¶¶ 39 & 41, at 90a & 91a. Article XIII, Section III of the Cincinnati City Charter explicitly provides that "no monies of the City of Cincinnati . . . may be disbursed to any . . . political action committee, . . . or may be expended for the purpose of advocating . . . the passage or defeat of any ballot issue." (R. 28 ¶74.) Thus, any efforts undertaken by the City in support of the passage of Issue 10 could not be considered governmental speech by the City. Yet, "[t[he City maintains that the [School Levy Rally] was consistent with its policies in effect at that time as to the use of the interior spaces of City Hall." (Petition, App. D ¶45.)

[14] Petition, App. D ¶70, at 97a.

[15] Petition, App. D ¶71, at 97a.

groups, including the private group advocating passage of the school levy. At the time, Plaintiffs had been engaged in an initiative petition effort seeking to amend the Charter of the City of Cincinnati to prohibit the implementation of an automated photo-monitoring program to enforce claimed violations of City traffic laws.[16]

On April 28, 2008, counsel for the Plaintiffs wrote to the Cincinnati City Manager asking to have "a press conference and rally" in "exactly the same location" as the School Levy Rally.[17] This press conference would have been to promote the petition drive relating to the photo-monitoring program. Despite the fact that the City had previously opened and made spaces inside of Cincinnati City Hall for political speech by private individuals and groups, the City denied Plaintiffs access to the same venue that they had allowed those in support of the school tax levy to use for the School Levy Rally. In a letter dated April 29, 2008, the City's facilities manager, Joel Koopman, rejected the Plaintiffs' request, claiming that (i) Old Administrative Regulation #5 governed Plaintiff's proposed use, and (ii) the use of any City facility was purportedly for conducting business related to the functions of the City's various departments and by City Council in the performance of their duties.[18]

The only reason that Plaintiffs' proposed use of specific spaces inside of Cincinnati City Hall for their

---

[16] Petition, App. D ¶72, at 98a.

[17] Petition, App. D ¶25 & Exh. P, at 87a.

[18] Petition, App. D ¶26 & Exh. Q, at 87a.

desired event was not permitted was because the Plaintiffs had not received an entirely subjective blessing from one of the 130 City officials who were authorized to permit such an event. But neither Mr. Koopman's letter nor Old Administrative Regulation #5 provided any guidelines or criteria to such City officials or to Plaintiffs as to when such permission would or should be granted and when it would or should be denied.[19]

As a result of the City's rejection of the Plaintiffs' request, Plaintiffs were relegated to hold their press conference *outside* of City Hall, a venue which diminished the communicative message, as well as the significance and symbolism in the Plaintiffs' press conference and rally.[20]

Despite relegating Plaintiffs to the outside of Cincinnati City Hall for their desired press conference and rally, the City amazingly allowed, about a month later, another press conference in one of the designated spaces *inside* of City Hall by a private

---

[19] Additionally, when the City's facilities management receives a request from one of the 130 City officials who can sponsor events, such a request is acted upon under the assumption that the use would be for a "proper purpose" but no analysis or assessment is undertaken to confirm that the City official or employee is actually implementing official City business in so using the space. (Petition, App. D ¶35, at 89a.)

[20] Before the District Court, there was unrebutted expert testimony concerning the significant logistical, material, symbolic and communicative differences between holding an event in the interior of the City Hall versus outside. Additionally, such expert testimony also established the unique communicative purposes served by the specific areas at issue in this case.

group – this one by an organization known as Citizens for Community Values ("CCV"). CCV's request to hold a press conference inside of City Hall was made by contacting an aide to a member of City Council. The request by CCV simply asked to "use" a conference room; it did not seek the "sponsorship" of anyone with the City in order to hold the subject press conference.[21] And as a result of the request by CCV to "use" a conference room, the aide, in turn, simply requested the City's facilities management department to arrange such use.

Thus, on June 9, 2008, CCV held its press conference (the "CCV Press Conference") in conference room 115 of City Hall.[22] As with the School Levy Rally, the City provided the podium and microphone used by CCV for the press conference.[23] Furthermore, the councilmember whose aide arranged the use of the conference room was not present at the CCV Press Conference, and, in fact, no City official or employee even spoke at the press conference.[24]

In light of the City continuing to open certain areas inside of City Hall for advocacy by private groups or individuals (even when City officials were not present nor participating in such events), the Plaintiffs made a second request for similar use of such spaces. On July 17, 2008 (approximately a month after the CCV

---

[21] Petition, App. D ¶19, at 92a.

[22] Petition, App. D ¶46, at 92a.

[23] Petition, App. D ¶53, at 93a.

[24] Petition, App. D ¶¶50 & 51, at 92a & 93a.

Press Conference), Plaintiff Mark Miller submitted a second request on behalf of the Plaintiffs to the City seeking, once again, to use space inside City Hall for a rally and press conference.[25] This second proposed rally and press conference would have been to announce and celebrate the turn-in of more than 14,000 signatures collected for the proposed amendment to the City Charter prohibiting the implementation of a photo-monitoring program by the City.

And despite having allowed numerous private individuals and groups to utilize spaces inside of City Hall for press conferences and rallies, including the recently held CCV Press Conference, the City once again denied Plaintiffs equal access to areas within City Hall comparable to that which the City had provided to other private individuals and groups.[26]

Due to the City's refusal, under the guise of implementing the City's policy under Old Administrative Regulation #5, to afford Plaintiffs access to certain spaces within City Hall (while allowing such access to other private organizations), as well as Plaintiffs' desire to engage in other public initiative efforts relating to the City (including press conferences and rallies inside of City Hall), Plaintiffs, on August 15, 2008, commenced this action, seeking injunctive and declaratory relief, together with nominal damages, arising from the violation of their First Amendment rights. Plaintiffs' claims were

---

[25] Petition, App. D ¶27 & Exh. R, at 87a.

[26] Petition, App. D ¶28 & Exh. S, at 87a.

premised generally upon the following: (i) the First Amendment does not allow the government and its officials to discriminate in allowing certain private individuals or groups access to public property in order to engage in the exercise of political speech, while, at the same time, denying such access to others based solely upon whether such groups obtain the prior approval or support by governmental officials for such activities; and (ii) by requiring, without any criteria or, at best, generally vague standards, prior approval or sponsorship of a City official before any of the designated venues inside of City Hall will be made available for political rallies and press conferences by private individuals or groups, the City has imposed an unconstitutional prior restraint upon the Plaintiffs' exercise of their freedom of speech based upon unconstitutionally vague standards.

Three days after the commencement of this action, the District Court held a hearing on Plaintiffs' motion for a temporary restraining order. The District Court, in a 20-page opinion, concluded that:

> [Old] Administrative Regulation #5 suffers from vagueness. First, its prohibitive terms are not clearly defined. There is no guidance as to what constitutes being "in the public interest," save the lone example of "the United Way Campaign." Second, there are no clear standards which would guide a City official to enforce the Regulation. . . . As such, the Court finds that Plaintiffs are likely to succeed on the merits of their due process claim based upon the doctrine of vagueness.

Accordingly, the District Court restrained the City from applying Old Administrative Regulation #5. No appeal was taken from the issuance of the temporary restraining order.

Subsequently, on September 9, 2008, the City Manager promulgated a new regulation regarding the use of spaces inside City Hall, *i.e.*, New Administrative Regulation #5. This new regulation declared, in part, that:

> City Hall is lawfully for the purpose of allowing City officials to exercise the rights and responsibilities specified in the Charter of the City of Cincinnati. . . .
>
> The interior spaces of City Hall are reserved for use by the Mayor, the City Manager and his assistants, City Councilmembers, City Department Directors, City Commissions and Boards, and City employees. The interior of City Hall is open to the public for purposes of visiting City offices and attending City Council and other public meetings. The interior of City Hall is not generally available to the public for other purposes.
>
> When the Mayor, the City Manager and his assistants, City Councilmembers, City Department Directors, and City Commissions and Boards intend to use interior spaces of City Hall for assemblages, they should notify the Facilities Management Division of the Public Services Department. . . .
>
> Facilities Management is responsible for insuring that the assemblage does not create security problems, unreasonably interfere with ingress or egress from City Hall, or otherwise

unreasonably interfere with the other official uses occurring inside City Hall.

In light of the issuance of New Administrative Regulation #5, Plaintiffs filed a Second Amended Complaint which contended, *inter alia*, that New Administrative Regulation #5 suffered from the same or similar constitutional infirmities as Old Administrative Regulation #5, *i.e.*, utilizing an arbitrary and capricious standard, and allowing the exercise of unbridled discretion by nearly 130 City officials in determining what private individuals or groups would be permitted to have access to and to utilize spaces inside of City Hall for, *inter alia*, press conferences and rallies.

Having already issued a temporary restraining order with respect to Old Administrative Regulation #5, the District Court considered Plaintiffs' motion for preliminary injunction based on the Second Amended Complaint and its challenge to New Administrative Regulation #5. Based upon all of the evidence before it regarding the uses of the pertinent spaces inside of City Hall, as well as the language and actual implementation of Administrative Regulation #5, the District Court concluded that the Plaintiffs demonstrated a likelihood of success such that a preliminary injunction should issue.[27] Specifically, the District Court found that the City's restriction on Plaintiffs' speech, through the implementation of Administrative Regulations #5, was not reasonably related to purposes of the various fora at issue. The District Court, thus, concluded that "the only clear

---

[27] Petition, App. B, at 31a – 67a.

restriction on access to the interior of City Hall is sponsorship of a City official", but that "the sponsorship requirement is not reasonably related to the purpose of the forum. . . . The sponsorship requirement only minimally limits speakers and the topics to those related to the work of City officials."[28] And accordingly, the District Court concluded "that Plaintiffs have shown a likelihood of success on the merits of their First Amendment claim to the extent that it is based upon a facial challenge under the public-forum doctrine."[29]

Additionally, the District Court concluded that Plaintiffs demonstrated a likelihood of success on the merits when it concluded that New Administrative Regulation #5 was likely unconstitutionally vague: "the terms of Administrative Regulation #5 are not clearly defined. The only direction the Regulation provides is that the purpose of the interior of City Hall is to allow City officials 'to exercise the rights and responsibilities specified in the Charter of the City of Cincinnati.' There are no clear standards that would guide a City official to judge whether a use fell within this specified purpose. As such, the Court finds that Plaintiffs are likely to succeed on the merits of their due process claim based upon the doctrine of vagueness."[30] And, thus, based upon the foregoing findings and conclusions, the District Court preliminarily enjoined the City from permitting or denying access to the interior of City Hall pursuant to

---

[28] Petition, App. B, at 58a.

[29] Petition, App. B, at 58a.

[30] Petition, App. B, at 65a.

Administrative Regulation #5. This conclusion and its underlying bases were affirmed by a panel of the Sixth Circuit. The Petitioners' request for *en banc* review by the Sixth Circuit was denied with no member of the Sixth Circuit even requesting a poll.

ARGUMENT

In addition to rejecting the misdirected effort of the Petitioners to invoke the government speech doctrine by analogizing the installation of permanent monuments in a public park to the delivery of speeches and the holding of marches and demonstrations by private groups, the Sixth Circuit also affirmed the District Court's granting of a preliminary injunction based upon two separate and independent grounds: Plaintiffs demonstrated a substantial likelihood of success in their challenge to New Administrative Regulation #5 (i) pursuant to this Court's free-speech public-forum doctrine; and (ii) based upon the lack of any meaningful guidance by which city council members and department heads would exercise the complete discretion given to them in selecting who they will allow to use space within Cincinnati City Hall.

Because these two grounds stand independent of one another to support the issuance of the preliminary injunction, Petitioners need to demonstrate that both grounds, *i.e.*, the forum analysis and the void-for-vagueness analysis, present sufficiently compelling reasons for this Court to grant the Petition. Otherwise, all this Court would provide would be an advisory opinion on a non-dispositive issue. But Petitioners have not presented sufficiently compelling reasons for review of any of the issues their Petition

asked this Court to decide. This Court should therefore decline their request that it undertake to repeat the Sixth Circuit's review of the district court's discretionary decision to issue a preliminary injunction.

THE PETITIONERS HAVE NOT ESTABLISHED SUFFICIENTLY COMPELLING REASONS FOR THIS COURT TO REVIEW THE APPLICATION OF THIS COURT'S PUBLIC FORUM DOCTRINE AS IT CONCERNS THE ISSUANCE OF A PRELIMINARY INJUNCTION

In their effort to feign some circuit split on the reasonableness of government control over limited public fora or nonpublic fora, the Petitioners fail to acknowledge or appreciate that the reasonableness of such control "must be assessed in the light of the purpose of the forum *and all the surrounding circumstances*." *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 809 (1985)(emphasis added). For while "[c]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity," this is true only "so long as the distinctions drawn are reasonable in light of the purpose served by the forum." *Id.* at 806; *accord Good News Club v. Milford Central School*, 533 U.S. 98, 106-07 (2001).

An assessment of the reasonableness of government control over limited public fora or nonpublic fora is, by nature, a fact-intensive inquiry. Yet, the Petitioners proceed from the mistaken premise that resolution of the question of such reasonableness may occur in a vacuum. But in this case, both the District Court and the Sixth Circuit properly assessed the facts that were

developed for consideration of the issuance *vel non* of a preliminary injunction and that were specifically applicable to the use of particular areas within Cincinnati City Hall. In so doing, both Courts concluded that the sponsorship requirement of Administrative Regulation #5 is likely to be found constitutionality deficient. As the District Court stated:

> the Court finds that the sponsorship requirement is not reasonably related to the purpose of the forum. The stated purpose of the forum is to allow City officials [to] exercise their rights and responsibilities under the City Charter. The sponsorship requirement only minimally limits speakers and the topics to those related to the work of City officials.

And the Sixth Circuit similarly recognized that the Administration Regulation #5 lacks a reasonable relation to the claimed purposes of the fora at issue:

> . . . the remaining issue is whether the requirement [that private individuals or organizations seeking to engage in rallies and press conferences inside of Cincinnati City Hall obtain the sponsorship or collaboration of certain city officials] is reasonably related to the purpose of the forum. The stated purpose of the forum is to allow city officials to exercise their rights and responsibilities under the City Charter. But, *Administrative Regulation #5 permits authorized officials to open spaces in city hall to private parties for events that they do not attend or assist in organizing*. As a result, *the sponsorship or collaboration requirement, as*

> *drafted, bears little relationship to any official duties under the City Charter*. We therefore hold that the district court did not abuse its discretion in concluding that plaintiffs have shown a likelihood of success on the merits of their facial First Amendment challenge to the sponsorship requirement under the public forum doctrine.

Every public forum case involves different fora each with their own distinct characteristics and purposes, different regulations, and different justifications for the challenged regulations and limitations. *See, e.g., Paulsen v. County of Nassau*, 925 F.2d 65, 69 (2d Cir. 1991)("[b]ecause forum analysis involves fact-specific concerns, courts have reached divergent conclusions regarding the status of municipal stadiums"). The foregoing conclusions by both the District Court and the Sixth Circuit were premised based upon the specific facts developed for consideration of the issuance *vel non* of a preliminary injunction vis-à-vis certain specific areas inside of Cincinnati City Hall.

In ignoring that forum analysis involves fact-specific concerns, the Petitioners posit a one-size-fits-all reliance upon other public fora cases in an effort to convince this Court to grant the Petition. Yet, in the cases to which Petitioners rely, the fora, the regulations governing the fora, and the putative justification for such regulations are distinctly different than that involved in this case. In *Del Gallo v. Parent*, 557 F.3d 58 (1st Cir. 2009), the challenged regulation barred election campaigning on sidewalks located on post office property, not certain areas within a city hall. In *Del Gallo*, the First District recognized "that a politically neutral government entity's interest

in avoiding the appearance of political entanglement is a valid justification for limiting speech in a non-public forum," id. at 73, and, thus, the regulation at issue was reasonable in light of the purpose of the forum. But in this case, the Petitioners do not contend that Administrative Regulation #5 is designed to avoid the appearance of political entanglement; in fact, undisputedly political activity is permissible within the areas of Cincinnati City Hall, it just depends upon whether one has the a blessing from one of the 130 City officials who were authorized to sponsor or arrange for such an event.[31]

Similarly, in *American Civil Liberties Union v. Mote*, 423 F.3d 438 (4th Cir. 2005), the Fourth Circuit concluded that the fora at issue, *i.e.*, areas of a college campus, were limited public fora devoted to the mission of public education that focused on the students and other members of the university community. This conclusion was arrived at after "[e]xamining the circumstances of this case," *id.* at 444, not simply through *ipse dixit* as the Petitioner would have the courts do in this case.[32] In the present

---

[31] And the most blatant example of purely political activity within Cincinnati City Hall was the School Lævy Rally by various private individuals and organizations with the pep-rally chanting of "Yes on 10, for our children".

[32] The Petitioners appear to believe that the City's "stated purpose" of the fora at issue, i.e.,"to allow City officials to exercise their rights and responsibilities under the city Charter" is somehow irrefutably dispositive. (Petition, at 15.) But that is not accurate. *See Christ's Bride Ministries, Inc. v. SEPTA*, 148 F.3d 242, 251 (3d Cir. 1998) ("[t]he [government's] own statement of its intent, however, does not resolve the public forum question"); *Air Line Pilot's Ass'n, Inc. v. Dep't of Aviation*, 45 F.3d 1144, 1153-54

case, a review of the opinions of both the Sixth Circuit and the District Court reveal that, while both courts recognized what the City of Cincinnati was declaring the purpose of the fora to be, the actual facts developed to date belied such a declaration which, in turn, supported both courts' conclusion that such regulations were not reasonably related to the purpose of the fora. As the District Court concluded:

> The Court notes that a variety of events have been held by independent individuals and organizations who are not City officials. These events were open to the public, and were only related to the exercise of the rights and responsibilities of the City officials in the most general sense. The City official who sponsors an event is not required to be present at the event, and is often not present. It is clear that City officials use the interior of City Hall however and whenever they desire, without regard to any limitations. The current version of Administrative Regulation #5 does nothing to alter this practice.

Thus, the present case clearly falls within the ambit of that which *Mote* recognized could not be done, even on the college campus at issue in *Mote*: "once a limited forum has been created, entities of a 'similar character' to those allowed access may not be excluded." *Mote*, 423 F.3d at 444 (quoting *Warren v. Fairfax County*, 196 F.3d 186, 194 (4th Cir. 1999)). While the City of Cincinnati may try to self-servingly declare and

---

(7th Cir. 1995) (government's stated policy is not dispositive with respect to the government's intent in a given forum).

attempt to constrain the purpose of the fora at issue, the record of actual use of the fora developed for consideration of the issuance *vel non* of the preliminary injunction led both the District Court and the Sixth Circuit to conclude otherwise.

Furthermore, the Sixth Circuit appreciated that "[t]his Court, like other appellate courts, has always applied the abuse of discretion standard on review of a preliminary injunction." *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 664 (2004)(quoting *Walters v. National Assn. of Radiation Survivors*, 473 U.S. 305, 336 (1985)(O'Connor, J., concurring). Thus, "[i]f the underlying constitutional question is close, . . . [this Court will] uphold the injunction and remand for trial on the merits." *Id.* at 664-65; *accord Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-32 (1975)("while the standard to be applied by the district court in deciding whether a plaintiff is entitled to a preliminary injunction is stringent, the standard of appellate review is simply whether the issuance of the injunction, in light of the applicable standard, constituted an abuse of discretion. While we regard the question as a close one, we believe that the issuance of a preliminary injunction . . . was not an abuse of the District Court's discretion").

And while Plaintiffs do not believe that the underlying constitutional question is even a close call, the highly deferential standard afforded to decisions of district courts to issue *vel non* preliminary injunctions only further demonstrates the lack of compelling reasons for this Court to grant the Petition.

THE PETITIONERS HAVE NOT ESTABLISHED SUFFICIENTLY COMPELLING REASONS FOR THIS COURT TO FURTHER AND MORE BROADLY EXPAND THE CONCEPT OF GOVERNMENT SPEECH AT THE EXPENSE OF THE PUBLIC FORUM DOCTRINE

As the Sixth Circuit's opinion correctly noted, the Petitioners raised its government-speech argument for the first time on appeal, notwithstanding that the concept and application of the government-speech doctrine was established prior to the commencement of this case and, thus, could have been raised in the District Court. *See, e.g., Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 553 (2005)("the dispositive question is whether the generic advertising at issue is the Government's own speech and therefore is exempt from First Amendment scrutiny"). This notwithstanding, the Sixth Circuit proceed to considered (and reject) the Petitioners' government-speech argument in light of this Court's recent decision in *Pleasant Grove v. Summum*, 555 U.S. ___, 129 S.Ct. 1125 (2009).

As this Court recognized in *Summum*, "[t]here may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech." *Id.* at ___, 129 S.Ct. at 1132. Petitioners' mere disagreement with the Sixth Circuit's tentative application of *Summum* to a unique, and not fully developed, set of facts fails to justify Petitioners' request that this Court review the issuance of the preliminary injunction on this issue. Instead of waiting until the record on the application

of the "recently minted government speech doctrine"[33] is fully developed in this case through full discovery and a trial, the Petitioners seek to have this Court rapidly expand the government speech doctrine based upon the limited record submitted to the District Court for purposes of the hearing on the preliminary injunction. For the parties themselves expressly declared that they did not "waive the right to conduct additional discovery following [the preliminary injunction] hearing." Moreover, the record was not developed with a view to presenting the facts needed to resolve the City's government-speech defense, as that defense was not asserted by Petitioners in the District Court. Thus, it is clearly premature for this Court to consider the application *vel non* of the government speech doctrine at this stage of the proceedings. As Justice Souter cautioned in *Summum*, "it would do well for [this Court] to go slow in setting [the government speech doctrine's] bounds, which will affect existing doctrine in ways not yet explored."[34]

In seeking to greatly expand the government speech doctrine through this case, the Petitioners wrongly declare that "[t]he predominant concepts in *Summum* are identical to those in this case."[35] But in making such a argument, as well as unendingly relying upon *Summum*, the Petitioners are doing exactly what this Court in *Summum* expressly

---

[33] *Summum*, 555 U.S. at ___, 129 S.Ct. at 1139 (Stevens, J., concurring).

[34] *Summum*, 555 U.S. at ___, 129 S.Ct. at 1141 (Souter, J., concurring).

[35] Petition, at 22.

rejected, *i.e.*, attempting to "analogize the installation of permanent monuments in a public park to the delivery of speeches and the holding of marches and demonstrations."[36]

Review of Petitioners' government-speech claim is particularly unwarranted at this time because the development of what constitutes government speech versus simply enabling private speakers is appropriately, and relatively consistently, being developed by the circuit courts. *E.g.*, *Sons of Confederate Veterans, Inc. v. Commissioner of Virginia Department of Motor Vehicles*, 288 F.3d 610, 618 (4th Cir. 2002)(factors to assess whether speech is government or private include: "(1) the central "purpose" of the program in which the speech in question occurs; (2) the degree of "editorial control" exercised by the government or private entities over the content of the speech; (3) the identity of the "literal speaker"; and (4) whether the government or the private entity bears the "ultimate responsibility" for the content of the speech"); *Arizona Life Coalition Inc. v. Stanton*, 515 F.3d 956, 965 (9th Cir. 2008)("[w]e therefore adopt the Fourth Circuit's four-factor test . . . to determine whether messages . . . constitute government or private speech"); *Choose Life Illinois, Inc. v. White*, 547 F.3d 853, 863 (7th Cir. 2008)(the "'multi-factor test [approach of the Fourth and Ninth Circuits] can be distilled (and simplified) by focusing on the following inquiry: Under all the circumstances, would a reasonable person consider the speaker to be the government or a private party? Factors bearing on this analysis include, but are not limited to, the degree

---

[36] *Summum*, 555 U.S. at ___, 129 S.Ct. at 1137.

to which the message originates with the government, the degree to which the government exercises editorial control over the message, and whether the government or a private party communicates the message"); *see also Summum*, 555 U.S. at ___ 129 S.Ct. at 1142 (Souter, J., concurring)("the best approach that occurs to me is to ask whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech the government chooses to oblige").

The Sixth Circuit's conclusion that Respondents are likely to prevail on this issue is fully consistent with these decisions. Based on the record before the Sixth Circuit, there was ample support for the view that the speech of other groups that had been permitted in City Hall could not have been understood by reasonable observers to be attributable to the government. This Court should proceed slowly and with caution in expanding the bounds of the government speech doctrine, especially, in a case that lacks a fully developed record. The circuit courts are adequately developing the scope and limits of the doctrine. Accordingly, at this time and based on the limited and preliminary record, this Court should deny the Petition.

THE PETITIONERS HAVE NOT ESTABLISHED SUFFICIENTLY COMPELLING REASONS FOR THIS COURT TO REVIEW THE APPLICATION OF THE VOID-FOR-VAGUENESS DOCTRINE TO THE ISSUANCE OF THE PRELIMINARY INJUNCTION

The First Amendment forbids laws that give public officials unbounded discretion to regulate speech.

Forsyth County v. Nationalist Movement, 505 U.S. 123, 130-33 (1992). A law is unconstitutionally vague when, *inter alia*, it lacks definitive standards for those who apply or enforce the law such that the potential exists for arbitrary and discriminatory enforcement. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). For the exercise of discretionary decisions by public officials must be guided by "narrow, objective, and definite standards." *Forsyth County*, 505 U.S. at 130; *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-151 (1969). Such requirements are especially stringent in the context of free speech because vague language and undue discretion allow officials to discriminate against certain viewpoints. *Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757, 763-64 (1988); *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). And, in this case, the Sixth Circuit appropriately and properly applied such well-established standards in the review of the District Court's issuance of a preliminary injunction.

In seeking to have this Court review the Sixth Circuit's decision with respect to the void-for-vagueness doctrine, the Petitioners simply indicate their displeasure or disagreement with the conclusion reached by the Sixth Circuit.[37] Lacking from the argument of the Petitioners is "[a] direct and concise argument amplifying the reasons relied on for allowance of the writ." S.Ct. Rule 14(h). The Petitioners do not even posit that the Sixth Circuit's decision with respect to the void-for-vagueness

---

[37] Petition, at 24 ("the Sixth Circuit misapprehended and misapplied the void for vagueness standard").)

document is "in conflict with the decision of another United States court of appeals on the same important matter," S.Ct. Rule 10(a), or that the Sixth Circuit "decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." S.Ct. Rule 10(c).

Other than disagreeing with the decision of the Sixth Circuit (and the District Court), the Petitioners simply raise a brief and passing question as to whether the void-for-vagueness principle should be applicable in nonpublic fora.[38] But in questioning whether the void-for-vagueness principle should be applicable in a nonpublic forum, the Petitioners do not identify or contend the existence of a split amongst the circuit courts. As the Federal Circuit rightfully acknowledged in *Griffin v. Secretary of Veterans Affairs*, 288 F.3d 1309 (Fed. Cir. 2002), "several cases from our sister circuits [] have struck down standardless licensing schemes in nonpublic fora." *Id.* at 1323;[39] *see Child*

---

[38] Petition, at 25.

[39] Petitioners wrongly contend that the Federal Circuit in *Griffin* "expressed skepticism" as to whether a void-for-vagueness could even be applicable in a nonpublic forum. (Petition, at 25 n.42.) However, no such skepticism was expressed. Instead, the Federal Circuit simply recognized that "no Supreme Court decision attempts to apply the unbridled discretion doctrine in the context of a nonpublic forum." *Griffin*, 288 F.3d at 1322. Then, after recognizing that other circuit courts have applied void-for-vagueness analysis in nonpublic fora, the Federal Circuit did likewise, though recognizing that "greater latitude ought to be accorded to government officials in nonpublic fora." *Id.* at 1323. Thus, contrary to the contention or suggestion of the Petitioners,

Evangelism Fellowship of Maryland v. Montgomery County Pub Sch., 457 F.3d 376, 386 (4th Cir. 2006)("[a]lthough the Supreme Court has not yet had occasion to apply the unbridled discretion doctrine outside the context of a traditional public forum, the dangers posed by unbridled discretion – particularly the ability to hide unconstitutional viewpoint discrimination – are just as present in other forums. Thus, there is broad agreement that, even in limited public and nonpublic forums, investing governmental officials with boundless discretion over access to the forum violates the First Amendment"); *Atlanta Journal & Constitution v. City of Atlanta Dep't. of Aviation*, 322 F.3d 1298, 1310-11 (11th Cir. 2003); *Lewis v. Wilson*, 253 F.3d 1077, 1079-80 (8th Cir. 2001).

The Petitioners' disagreement with the District Court's and the Sixth Circuit's application of the void-for-vagueness doctrine (as well as the decisions from the other circuit courts that also apply the doctrine to nonpublic fora) does not rise to the level of a significantly compelling reason for this Court to grant the Petition in order to review the issuance of the preliminary injunction.

---

the Federal Circuit in *Griffin*, like other circuit courts, directly applied the void-for-vagueness doctrine in nonpublic fora; it (like the other circuits) simply was more deferential to government officials than they would be if the forum was a public forum. It is also important to recognize and appreciate that the fora at issue in this case, pursuant to the factual findings of the District Court, are limited public fora, not nonpublic fora.

CONCLUSION

The Petition fails to establish any justification for this Court to review the District Court's issuance of the preliminary injunction. There is no true conflict among the circuits nor any conflict with this Court's precedent. The Petition should be denied so that a full record may be developed through discovery and trial.

Respectfully submitted,

Christopher P. Finney
Counsel of Record
FINNEY, STAGNARO, SABA & PATTERSON CO., LPA
2623 Erie Avenue
Cincinnati, Ohio 45208
Telephone: (513) 533-2980
Facsimile: (513) 533-2990
Email: cfinney@fssp-law.com

Curt C. Hartman
THE LAW FIRM OF CURT C. HARTMAN
3749 Fox Point Court
Amelia, Ohio 45102
Telephone: (513) 752-8800
Facsimile: (513) 752-6621
Email: hartmanlawfirm@fuse.net

Attorneys for Respondents

184 (3)

No. 10-1054

Supreme Court, U.S.
FILED
APR 21 2011
OFFICE OF THE CLERK

In the Supreme Court of the United States

CITY OF CINCINNATI,
MILTON R. DOHONEY, JR., AND JOEL KOOPMAN,
Petitioners,

v.

MARK MILLER, COALITION OPPOSED
TO ADDITIONAL SPENDING & TAXES,
AND WEDEMANDAVOTE.COM,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONERS' REPLY BRIEF

JOHN P. CURP
CITY SOLICITOR
PAULA BOGGS MUETHING
ASSISTANT CITY SOLICITOR
Counsel of Record
RICHARD GANULIN
ASSISTANT CITY SOLICITOR
ROOM 214, CITY HALL
801 PLUM STREET
CINCINNATI, OHIO 45202
(513) 352-4551
(513) 352-1515 FAX
paula.boggs-muething@cincinnati-oh.gov

April 21, 2011 — *Counsel for Petitioners*

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

STATEMENT OF THE CASE 2

The Sixth Circuit's determination that the City's Administrative Regulation No. 5 is not reasonably related to the purpose of the forum is inconsistent with the analyses of the First and Fourth Circuits in Del Gallo and ACLU 5

Speech arranged by and for government officials for public purposes within the scope of their official responsibilities is government speech even though third parties participate 9

TABLE OF AUTHORITIES

CASES

ACLU v. Mote,
423 F.3d 438 (4th Cir. 2005) 1, 5, 7, 8

ACLU of Tennessee v. Bredesen,
441 F.3d 370 (6th Cir. 2006) 9

Ariz. Life Coalition, Inc. v. Stanton,
515 F.3d 956 (9th Cir. 2008) 10

Arkansas Educ. Television Comm'n v. Forbes,
523 U.S. 666 (1998) 1

Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., et al.,
473 U.S. 788 (1985) 1

Del Gallo v. Parent,
557 F.3d 58 (1st Cir. 2009) 1, 5, 6, 7

Illinois Dunesland Preservation Society v. Illinois Department of Natural Resources,
584 F.3d 719 (7th Cir. 2009) 10, 11

International Women's Day March Planning Committee v. San Antonio Free Speech Coalition,
619 F.3d 346 (5th Cir. 2010) . . . . . 12 ,13

Johanns v. Livestock Mktg. Ass'n.,
544 U.S. 550 (2005) 10

Perry Educ. Ass'n v. Perry Local Educators' Ass'n,
460 U.S. 37 (1983) 1

Planned Parenthood of S.C., Inc. v. Rose,
361 F.3d 786 (4th Cir. 2004) . . . . . 9, 10 ,12

Pleasant Grove City, Utah v. Summum,
555 U.S. 460 (2009) 9, 11, 13

Roach v. Stouffer,
560 F.3d 860 (8th Cir. 2009) 10

Sutliffe v. Epping,
584 F.3d 314 (1st Cir. 2009) 12, 13

Constitution

U.S. CONST. amend. I 1, 9, 11

Regulation

City of Cincinnati, Administrative Regulation
No. 5 . . . . . 2, 5

INTRODUCTION

The facts of this case present an important and unresolved First Amendment issue. The speech that is the subject of this case is not the private speech of a private party. Third parties do not have unilateral access to the interior spaces of City Hall for speech that is their own private speech. In *Arkansas Educ. Television v. Forbes*,[1] *Cornelius v. NAACP*,[2] and *Perry Education Association v. P.L.E.A.*,[3] as well as in the circuit court cases *Del Gallo v. Parent*[4] and *ACLU v. Mote*,[5] the speakers that sought access to the fora were competing with other speakers in order to express private speech. Cincinnati does not allow the use of City Hall for private speech. All speech, whether in collaboration with a third party or otherwise, must be related to and in furtherance of the work of City officials, individually or collectively. The Sixth Circuit ignored this critical distinction, summarily rejected the characterization of the collaborative speech as "government speech" and applied forum analysis principals that are inconsistent with the nature of the forum. The forum analysis principles applied by the Sixth Circuit in this case are only appropriate when the speech that is under scrutiny is the private speech of private individuals or organizations. The speech at

---

[1] 523 U.S. 666 (1998).

[2] 473 U.S. 788 (1985).

[3] 460 U.S. 37 (1983).

[4] 557 F.3d 58 (1st Cir. 2009).

[5] 423 F.3d 438 (4th Cir. 2005).

issue in this case is not private speech but is the product of collaboration between City officials and private individuals. It is for these reasons that this Court should grant certiorari.

STATEMENT OF THE CASE

Despite Respondents' repeated mischaracterization of the nature of the speech at issue in this case, the stipulated record demonstrates that all use of the spaces within City Hall were arranged or requested by City officials.[6] In order to access the interior spaces of City Hall for speech purposes private speakers must collaborate with a City official and communicate a message that is consistent with the message of that City official. Accordingly, Administrative Regulation No. 5 does not open this nonpublic forum to private use. Instead, it serves to provide City officials with a proper use of their workplace and does not deprive them of their own access simply because they are collaborating with private parties. Because City officials may only use the interior of City Hall for purposes consistent with their rights and responsibilities under the Charter and such uses are necessarily consistent with the purpose of the City Hall forum, the uses involving collaboration with third parties are reasonable in light of the purpose of the forum.

Respondents focus on two particular uses among the thousands of uses of the interior of City Hall set

---

[6] Joint Stipulations of Fact, App. D of the City's Petition, at para. 7.

forth in the calendars since 1997.[7] These two uses are the press conference held by Councilmember Cranley in support of the school tax levy[8] and the Citizens for Community Values ("CCV") press conference held by Councilmember Monzel in which CCV called upon an alternative newspaper to stop accepting adult advertisements.[9] In describing these events, Respondents notably omit the participation of City officials. For example, with respect to the school tax levy press conference: (1) a resolution in support of the school tax levy was on the City Council agenda for the City Council meeting that was to occur immediately following the press conference,[10] and (2) members of City Council, led by Vice-Mayor Crowley and Councilmember Cranley, pledged their support for the levy at the press conference.[11] The participation of City officials, in collaboration with private parties, was within the scope of the legislative duties of the aforementioned City officials. With respect to the CCV press conference arranged by Councilmember Monzel, Councilmember Monzel was a signatory to the letter presented at the press conference which called upon an alternative weekly newspaper to stop accepting adult advertisements.[12] Councilmember Monzel's conduct

---

[7] *Id.* at para. 6.

[8] *Id.* at para. 7(a).

[9] *Id.* at para. 46-47.

[10] *Id.* at para. 40.

[11] *Id.* at para. 7(a), exhibit F4.

[12] *Id.* at para. 46, 48.

was within the scope of his responsibilities to the City, consistent with his oath of office. Thus, a complete presentation of the facts surrounding these events illustrates that each event was within the proper scope of the officials' public duties.

Such facts are important, indeed critical to the analysis. But the district court and the Sixth Circuit failed to carefully and thoroughly examine the uses at issue, the speech of the participating private individuals, the connection between the use and the work of the collaborating official and the manner in which the use was consistent with the relevant official's rights and responsibilities under the City Charter. The stipulated record and the administrative regulation are clear: in order for a private individual to participate in a use of the interior of City Hall, there must be an overlap between the participation of the collaborating private individual, the communicative message espoused by the collaborating City official, and the purpose of the City hall workplace. While Respondents repeatedly attempt to recast the City's policy as one that allows private use of the interior of City Hall, such a characterization is unequivocally false and unsupported by the stipulated record. Private individuals are not permitted access to City Hall in order to use the interior spaces for a birthday party or a chess tournament. Private individuals, in collaboration with a City official, may come into City Hall and participate in a meeting, a press conference, or other use that is in furtherance of the work of the pertinent City official.

The Sixth Circuit's determination that the City's Administrative Regulation No. 5 is not reasonably related to the purpose of the forum conflicts with the analyses of the First and Fourth Circuits in *Del Gallo* and *ACLU*

Respondents concede that forum analysis "involves fact-specific concerns[,]"[13] but then proceed to disregard the critical distinction between the nature of the post office sidewalk nonpublic forum, in *Del Gallo v. Parent*,[14] and the City Hall nonpublic forum. While the *Del Gallo* court identified avoiding the appearance of political partisanship as a legitimate objective reason for excluding access, this must be contextualized given the particularized "purpose of the forum."

Individualizing the outcome to the particular character of the forum necessarily leads to a different conclusion with respect to City Hall because the nature of a workplace housing, among others, elected officials, contains multiple potential instances of partisanship. In order to avoid silencing the specific viewpoints of the City's elected officials, City Hall is necessarily political and partisan – the particular political persuasion or viewpoint depends only upon the individual City official's viewpoints and, as long as the use of City Hall is within the scope of the official's public duties, these viewpoints are not otherwise limited by the Administrative Regulation. Given the

---

[13] Respondents' Brief in Opposition to Petition for Writ of Certiorari ("Respondents' Brief"), p. 18.

[14] 557 F.3d 58 (1st Cir. 2009).

important differences that exist between the various types of nonpublic fora, a court must consider the specific character of the nonpublic forum when it evaluates the reasonableness of a regulation limiting access. Notwithstanding the Sixth Circuit's failure to do so in this case, an evaluation of the City Hall nonpublic forum reinforces the lawfulness of the City's regulation of the interior of City Hall.

After concluding that the post office sidewalk was a nonpublic forum, the *Del Gallo* court held:

> The reasonableness of a regulation is weighed "in light of the purposes served by the forum." "The purpose of the forum in this case is to accomplish the most efficient and effective postal delivery system," by providing access to post office customers. *The Postal Service's stated rationale* for disallowing election campaigning on its sidewalks is "to prevent abuses and to preclude any appearance of partisan endorsement or preference."[15]

Thus, the Court analyzed the purpose of the forum with reference to both its stated purpose and to the evidence presented regarding the history of its past uses. By contrast, the Sixth Circuit undertook no such inquiry and summarily dismissed the City's stated purpose of the City Hall nonpublic forum – to allow City officials to exercise their rights and responsibilities under the Charter.

---

[15] *Del Gallo*, 557 F.3d at 73 (internal citations omitted) (emphasis added).

In *Del Gallo*, the First Circuit further cautioned that the reasonableness of the regulation must be analyzed in light of the effect on all such affected premises, in that case post offices across the country. It further indicated that the reasonableness of the restriction was enhanced by the availability of alternative public fora for expression in close proximity.[16] Neither of these two reasonableness factors was considered by the Sixth Circuit. The Sixth Circuit disregarded the availability of an alternate forum for expression just steps away, on the exterior front portion of City Hall and on the adjacent public sidewalks,[17] and ignored the effect of its decision on other government workplaces throughout the Sixth Circuit. Accordingly, the Sixth Circuit's decision stands in marked contrast to that of the First Circuit in *Del Gallo* and should be reviewed by this Court.

In an attempt to characterize *ACLU v. Mote*[18] as supportive of its position, Respondents claim they are an "entit[y] of a 'similar character' to those allowed access[,]" to the areas within City Hall. Respondents have repeatedly attempted to recast themselves as "similarly situated" to other third parties who have collaborated with City officials to participate in uses within City Hall. Such a characterization is disingenuous at best. Respondents *refused* to collaborate with City officials or seek a City sponsor. Similarly, *ACLU's* Lyndon Larouche supporters

---

[16] *Id.* at 74-75.

[17] Joint Stipulations of Fact, App. D of the City's Petition, at para. 33.

[18] 423 F.3d 438 (4th Cir. 2005).

refused to obtain a student sponsor. By application of Respondents' reasoning, in order to prevail in *ACLU*, the Lyndon Larouche supporters needed only to identify a non-student who was provided access to the campus by virtue of being sponsored by a student in order to create parity with that sponsored student. Such reasoning ignores the core holding of *ACLU*.

In finding the limitation both viewpoint neutral and reasonable in light of the purpose of the forum, the Fourth Circuit held: "If outsiders desire to leaflet or give a speech in another area of campus, they must simply find a sponsor, and they can perform these activities anywhere on the campus."[19] In contrast, the Sixth Circuit stated that "the plaintiffs' claims are directed at the sponsorship requirement itself and do not allege that officials, in practice, exercise their discretion to grant sponsorship in a discriminatory manner . . . ." Thus, according to the Sixth Circuit, the mere existence in the City's Administrative Regulation of sponsorship as a prerequisite to access constituted an injury in fact. This, notwithstanding that the City also requires that any use of the interior of City Hall is consistent with the relevant City official's public duties. *ACLU* had no similar requirement for the sponsoring students and yet the sponsorship requirement was deemed reasonable by the Fourth Circuit. In order to resolve the inconsistent application of these forum analysis principals, the City respectfully requests review by this Court.

---

[19] *Id.* (citations omitted).

Speech arranged by and for government officials for public purposes within the scope of their official responsibilities is government speech even though third parties participate.

Though Respondents claim that the Circuits are uniformly applying *Pleasant Grove City, Utah v. Summum*,[20] this assertion is based upon a misapprehension of the analysis and holding in the Sixth Circuit case *ACLU of Tennessee v. Bredesen*.[21] Far from identifying a uniform application of the Fourth Circuit's four-factor test, discussed *infra*, Respondents have instead highlighted another circuit split. While some circuits have indeed adopted and applied the Fourth Circuit's four-factor test, the Sixth Circuit has expressly rejected this test. In *Bredesen*,[22] the Sixth Circuit held that a Tennessee statute authorizing a specialty license plate with a "Choose Life" message did not violate the First Amendment despite the fact that the legislature refused to similarly make available license plates with a "Pro-Choice" message.[23] In so doing, the Sixth Circuit recognized that the Fourth Circuit, in *Planned Parenthood of S.C., Inc., v. Rose*,[24] had invalidated a nearly identical specialty license plate law in South Carolina using the four-factor test. The Sixth Circuit

---

[20] 555 U.S. 460 (2009).

[21] 441 F.3d 370 (6th Cir. 2006).

[22] 441 F.3d 370, 376 (6th Cir. 2006).

[23] *Id.* at 372.

[24] 361 F.3d 786 (4th Cir. 2004).

explicitly rejected the four-factor test relied upon by the Fourth Circuit in *Rose*. However, the four-factor test has since been adopted by the Eighth and Ninth Circuits.[25] In analyzing the City's claim in the case at bar that the relevant speech was government speech, the Sixth Circuit employed no discernible analysis. Instead the Sixth Circuit summarily concluded that the government speech doctrine did not apply. It is clear that the circuits are split on the appropriate analysis by which to determine whether speech is properly characterized as government speech.

With the exception of *Johanns v. Livestock Mktg. Ass'n.*,[26] every government speech case cited by Respondents analyzes speech in the context of specialty license plates. The character and nature of the interior of City Hall is dramatically different from that of a license plate. City Hall is a workplace used by City officials to conduct the business of the City. The spaces within City Hall are limited and consequently the use of those spaces is similarly limited. License plates are not similarly limited – a government may provide seemingly endless message options for specialty license plates. Such products are not constrained by the logistical concerns of the use of spaces within City Hall. In *Illinois Dunesland Preservation Society v. Illinois Department of Natural Resources*,[27] the Seventh Circuit held that the materials chosen for a display rack in a public park

---

[25] See *Roach v. Stouffer*, 560 F.3d 860 (8th Cir. 2009); *Ariz. Life Coalition, Inc. v. Stanton*, 515 F.3d 956 (9th Cir. 2008).

[26] 544 U.S. 550 (2005).

[27] 584 F.3d 719 (7th Cir. 2009).

constituted government speech because the materials were designed to attract visitors to the park and promote tourism in Illinois. The Illinois Dunesland Preservation Society claimed that the failure to include its pamphlets was in violation of the First Amendment. The Seventh Circuit held that including the group's offending pamphlets could give them legitimacy, undermining the government's intended pro-tourism message.[28] The Court similarly found compelling the limited space of the display itself. The Court noted that if the park were required to display every privately endorsed pamphlet from an unlimited number of organizations, the requirement would lead inevitably to the elimination of all such display racks on public property.[29]

The City is confronted with a similar logistical problem. Because City Hall's primary purpose is as a workplace for City officials, forcing the City to open the forum to private parties for their own private use would overwhelm legitimate uses by City officials and, accordingly, the business of the City would be impeded. In order to avoid this result the City would instead be forced to close the forum to all speakers. "And where the application of forum analysis would lead almost inexorably to closing of the forum, it is obvious that forum analysis is out of place."[30]

---

[28] *Id.* at 725.

[29] *Id.*

[30] *Summum*, 555 U.S. at __, 129 S. Ct. at 1138.

Finally, while several circuits have adopted the *Rose*[31] four-factor test, debate continues regarding the measure of control the government must exert over a third party's message in order to properly characterize the speech at issue as government speech. In *Sutliffe v. Epping*,[32] a local government created a website with the intended purpose of conveying information about the town and its citizens to potential visitors. In the course of so doing, the town chose to add a limited number of hyperlinks on its website to some external organizations, to the exclusion of others. Holding that the website and the town's selection of included hyperlinks constituted government speech, the court held: "when the government uses its discretion to select between the speech of third parties for presentation through communication channels owned by the government and used for government speech, this in itself may constitute an expressive act by the government that is independent of the message of the third-party speech."[33]

By contrast, in *International Women's Day March Planning Committee v. San Antonio Free Speech Coalition*,[34] the Fifth Circuit analyzed San Antonio's financial subsidization of a limited number of annual parades and considered whether or not the government's endorsement of "the general message of each event through its provision of financial support[,]"

---

[31] 361 F.3d at 786.

[32] 584 F.3d 314 (1st Cir. 2009).

[33] *Id.* at 330.

[34] 619 F.3d 346 (5th Cir. 2010).

was sufficient to properly characterize those parades as government speech.[35] The Court held that the parade was not government speech, but instead constituted the private speech of the participants because the City did not exercise direct control over "the messages conveyed at its sponsored events[.]" In so deciding, the Court stated that for a procession to qualify as government speech the city would need to at least "make some bare showing of organizational or planning involvement."[36] *International Women's Day* conflicts with the *Sutliffe* court's holding that speech merely endorsed by the government, regardless of whether or not the government exerts any control of or involvement in developing the message, may properly be characterized as government speech.

Thus, contrary to the position advanced by Respondents regarding the uniformity of government speech analysis across the circuits, the analyses are far from settled. In the wake of *Summum,* there are residual as well as recent conflicts between the circuits. This Court should accept certiorari in order to clarify the appropriate analysis by which the circuits classify speech as government speech or private speech.

---

[35] *Id.* at 360.

[36] *Id.*

Respectfully submitted,

Paula Boggs Muething
Assistant City Solicitor
Counsel of Record
Richard Ganulin
Assistant City Solicitor
Room 214, City Hall
801 Plum Street
Cincinnati, Ohio 45202
(513) 352-4551
(513) 352-1515 FAX
paula.boggs-muething@cincinnati-oh.gov

Counsel for Petitioners